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No.

IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK and THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

-v-

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
Volume II

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APPENDIX F

81 FERC Section 61,248 (Order 888-B)

[¶ 61,248]

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Docket No. RM95-8-003

Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Docket No. RM94-7-004

Order No. 888-B; 62 Fed. Reg. 64688

(Issued November 25, 1997)

Before Commissioners; James J. Hoecker, Chairman, Vicky A. Bailey, and William L. Masey

Agency: Federal Energy Regulatory commission.

Action: Order No. 888-B (Order on Rehearing).

Summary: The Federal Energy Regulatory Commission (Commission) affirms, with certain clarifications, the fundamental calls made in Order No. 888-A

Effective Date: The tariff change ordered if the order on rehearing (see footnote 1) will become effective on February 9, 1998. The current requirements of Order Nos. 888 and 888-A will remain in effect until this order becomes effective.

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I. Introduction

In this order, the Commission affirms, with certain clarifications, the fundamental calls made in Order No. 888-A.[1]

II. Public Reporting Burden

This order on rehearing issues a minor revision to Order Nos. 888 and 888-A.[2] We find, after reviewing this revision, that it does not increase or decrease the public reporting burden.

Order No. 888 contained an estimated annual public reporting burden based on the requirements of the Open Access Final Rule and the Stranded Cost Final Rule.[3] Using the burden estimate contained in Order No. 888 as a starting point, we

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[1] As described further below, the Commission is making one revision to the *pro forma* open access transmission tariff. *See infra* section IV.A.10.f and appendix B. Because of this single revision and its minor nature, the Commission concluded that it would be administratively burdensome to require all public utilities with *pro forma* open access transmission tariffs on file with the Commission to submit compliance tariffs to reflect the revision. Accordingly, the Commission will amend all *pro forma* open access transmission tariffs currently on file with the Commission to incorporate the tariff revision and no tariff compliance filings will be necessary.

[2] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities. Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21.540 (May 10, 1996), *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 31,036 (1996), *order on reh'g. Order* No. 888-A, 62 Fed. Reg. 12.274 (March 14, 1997). *FERC Statutes and Regulations* ¶ 31,048 (1997).

[3] 61 Fed. Reg. 21,540, 21,543; *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 31,036, at p. 31,638 (1996). In Order No. 888-A, the Commission concluded that its estimate of the public reporting burden in that order on rehearing remained unchanged from its estimate in Order No. 888, 62 Fed. Reg. 12,274, 12,280; *FERC Statutes and Regulations* ¶ 31,048, at p. 30,183 (1997).

VOL. III

evaluated the public burden estimate in light of the revision contained in this order and assessed whether the estimate needed revision. We have concluded, given the minor nature of the revision, that our estimate of the public reporting burden of this order on rehearing remains unchanged from our estimate of the public reporting burden contained in Order Nos. 888 and 888-A. The Commission has conducted an internal review of this conclusion and has assured itself that there is specific, objective support for this information burden estimate. Moreover, the Commission has reviewed the collection of information required by Order Nos. 888 and 888-A, as revised and clarified by this order on rehearing, and has determined that the collection of information is necessary and conforms to the commission's plan, as described in Order Nos. 888 and 888-A, for the collection, efficient management, and use of the required information.

Persons wishing to comment on the collections of information required by Order Nos. 888 and 888-A, as modified by their order on rehearing, should direct their comments to the Desk Officer for FERC, Office of Management and Budget, Room 3019 NEOB, Washington, DC 20503, phone 202-395-3087, facsimile: 202-395-7285. Comments must be filed with the Office of Management and Budget within 30 days of Publication of this document in the *Federal Register*. Three copies of any comments filed with the Office of Management and Budget also should be sent to the following address: Ms. Lois Cashell, Secretary, Federal Energy Regulatory Commission, Room 1A, 888 First Street, NE., Washington, DC 20426. For further information, contact Michael Miller, 202-208-1415.

III. Background

In Order No. 888, the Commission required all public utilities that own, operate or control interstate transmission

facilities to offer network and point-to-point transmission services

* * * *

raised here by NEPOOL.[169] The Commission rejected NEPOOL's proposal to allow employees to possess securities of market participants as long as the value does not exceed $50,000. The Commission reaffirmed its strong commitment, set forth in Order Nos. 888 and 888-A, to ensure that an ISO is truly independent and that employees of an ISO are financially independent of market participants. However, the Commission recognized, as it had in Order No. 888-A, that there may be a need for flexibility with respect to the length of a transition period and that this matter is best addressed on a case-by-case basis.

13. Distribution Charges

NY Com seeks clarification of the Commission's statement that a utility is free to include a "distribution charge" in a customer's service agreement and/or the network customer's network operating agreement.[170] In particular, it requests that the Commission clarify that it did not intend to preempt state jurisdiction, but rather that when a term, condition or rate is required for local distribution service, the state determination will apply. It asserts that such a clarification would avoid forum shopping that would otherwise occur. In the alternative, it requests rehearing, arguing that the Federal Power Act, its legislative history and case law all dictate against Commission jurisdiction over local distribution.

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[169] *New England Power Pool*, 79 FERC ¶ 61,374 (1997), *reh'g pending*.

[170] NY Com at 5-12.

Commission Conclusion

We clarify, as requested by NY Com, that when a term, condition or rate is required for *local* distribution service the state determination applies. We reiterate that we believe there is always a local distribution service element of a retail transaction, through which the state may impose charges on the retail customer. We also reiterate, however, that where a public utility is delivering unbundled energy to a supplier that then resells the energy to an end user, the Commission has exclusive jurisdiction over the public utility's facilities used to effect the transaction without regard to their being labeled "transmission," "distribution," or "local distribution."[171] Moreover, where a public utility is delivering unbundled energy from a third-party supplier directly to an end user the particular facts of the case will determine which of the facilities are FERC-jurisdictional transmission facilities and which are state-jurisdictional local distribution facilities.[172]

14. Tight Power Pools

a. Non-pancaked rates

NY Com seeks clarification of the following statement in Order No. 888-A:

> Order No. 888 does not require a non-pancaked rate structure unless a non-pancaked rate structure is available to pool members. Although the Commission has encouraged the industry to reform transmission pricing, the Commission's

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[171] See Order No. 888, *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 31,036, at p. 31,969 (appendix G) and *Allegheny Power System, Inc., et al.*, 80 FERC ¶ 61,143, at pp. 61,551-52(1997).

[172] See Order No. 888, *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 31,036 at p. 31,969.

> current policy does not mandate a specific transmission rate structure.[[173]]

It argues that this statement conflicts with other statements that "require power pools to file joint pool-wide tariffs and to offer all transmission services that they are capable of providing."[174] NY Com asks that the Commission clarify that utility members of tight power pools must provide transmission service jointly under a single tariff. It states that this is the best way to eliminate undue discrimination. It argues that tight power pools must provide, pursuant to prior Commission orders, all transmission services that they are reasonably capable of providing and must file joint tariffs to provide transmission service on a pool-wide basis.

Commission Conclusion

NY Com appears to be confusing services that a power pool is capable of providing with *pricing methodologies* that a power pool may elect to use. While the Commission required that by December 31, 1996 all pool transactions be taken under a joint pool-wide tariff on file with the Commission, the Commission did not mandate a specific transmission rate structure for such tariff.[175] As we stated in Order No. 888-A, the primary goal for pooling arrangements is to ensure comparability regarding transmission services offered on a pool-wide basis. Thus,

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[171] NY Com at 12.

[174] *Id.* at 13 (emphasis in original).

[175] However, as explained in Order No. 888-A, the Commission did require that all transmission rate proposals filed in compliance with Order Nos. 888 and 888-A be cost based and meet the standard *for* conforming proposals set out in the Commission's Transmission Pricing Policy Statement. *See* 18 C.F.R. § 222.

comparability is achieved if the same service is provided at the same or comparable rate to both pool and non-pool members.[176]

* * * * *

firm distinctions."[204] The Commission further noted that the appropriate treatment of revenue credits for off-system sales is dependent on the rate design used by a transmission provider and concluded that this issue is not appropriately resolved on a generic basis. Despite these identified problems, TDU Systems continues to request that the Commission adopt an automatic revenue credit mechanism without attempting to address such problems or proposing an appropriate mechanism to accomplish its request.

To bolster its proposal, TDU Systems claims that automatic treatment of revenue credits is comparable to the Commission treatment of fuel charges through the use of an automatic fuel adjustment charge. We disagree. An automatic fuel cost adjustment clause was determined to be appropriate because of the unpredictability of fuel prices.[205] TDU Systems has not demonstrated that revenue credits warrant the same treatment.[206]

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[176] Order No. 888-A, *FERC Statutes and Regulations* ¶ 31,048, at p. 31,728.

[204] *FERC Statutes and Regulations* ¶ 31,048, at p. 30,310.

[205] *See* Treatment of Purchased Power in the Fuel Cost Adjustment Clause for Electric Utilities, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,524, at p. 30,800 (1983).

[206] In *Pennsylvania-New Jersey-Maryland Inter-connection, et al.*, §1 FERC ¶††††††(1997), issued concurrently with this order on rehearing, the Commission made an exception to its general approach to revenue credits and allowed monthly crediting of non-firm transmission revenues. However, this was done in the context of a major restructuring of a tight power pool.

Moreover, TDU Systems has not demonstrated that the lack of an automatic credit mechanism is likely to result in unjust and unreasonable rates. For example, the Commission's traditional means of accounting for transmission revenues for non-firm uses of the transmission system is to reflect a representative level of revenue credits (based on historical and/or projected revenue levels) in each rate case, which has the effect of lowering the transmission rate for all firm transmission users.[207] TDU Systems has not shown why a similar rate case approach to revenue credits (as opposed to an automatic credit mechanism) is not appropriate, particularly for all transmission providers. In any event, we would anticipate little or no difference between the results of an automatic revenue credit mechanism and our traditional approach and TDU Systems has not shown otherwise.

Finally, TDU Systems' proposal is one-sided in that it would only require the automatic passthrough of revenues from the *transmission provider's* use of the transmission system for offsystem sales. As the Commission stated in Order No. 888-A.

> *revenue from the transmission component of all* off-system uses of the transmission system *(whether by the transmission provider or a transmission customer)* must be treated on a comparable basis, whether through rate design or through revenue credits.[208]

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[207] *See, e.g., Pennsylvania Power Company*, 26 FERC ¶ 61,354, at p. 61,781 (1984).

[208] *FERC Statutes and Regulations* ¶ 31,048, at p. 30,310 (emphasis added).

B. Stranded Cost Issues[209]

1. Municipal Annexation

In Order No. 888, the Commission decided that it would not be the primary forum for stranded cost recovery in situations in which an existing municipal utility annexes territory served by another utility or otherwise expands its service territory.[210] In Order No. 888-A, the Commission reconsidered this decision and concluded that it would be the primary forum for stranded cost recovery in a discrete set of municipal annexation cases, namely, those involving existing municipal utilities that annex retail customer service territories and, through the availability of Commission-required transmission access, use the transmission system of the annexed customers' former supplier to access new suppliers to serve the annexed load.[211]

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[209] Some of the rehearing requests raise issues that previously were raised on rehearing of Order No. 888 and were addressed by the Commission in Order No. 888-A. The Commission will not further address such issues in this proceeding. For example, Puget repeats some of the same arguments that it raised in its request for rehearing of Order No. 888 concerning the federal causes of stranded costs, the Commission's alleged abdication of its legal authority to ensure recovery of stranded costs associated with bypass and retail wheeling, the application of the reasonable expectation test to departing retail customers, and the Commission's failure to include deferred costs in the revenues lost formula. The Commission addressed these concerns in Order No. 888-A. *See FERC Statutes and Regulations* ¶ 31,048, at pp. 30,358-62, 30,424, 30,426-27. TDU Systems reiterates its objection to the Commission's elimination of the section 35.15 prior notice of termination requirement for power sales contracts executed after July 9, 1996 that terminate by their own terms. The Commission addressed TDU Systems' concerns in this regard in Order No. 888-A. *See FERC Statutes and Regulations* ¶ 31,048, at pp. 30,392, 30,393-94.

[210] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 31,036, at pp. 31,818.

[211] *FERC Statutes and Regulations* ¶ 31,048, at pp. 30,408-09.

A number of petitioners seek rehearing or reconsideration[212] of the Commission's decision in Order No. 888-A to be the primary forum for stranded cost recovery in the case of municipal annexations.[213] Some oppose this decision for the same reasons that they opposed the Commission's decision to be the primary forum for stranded cost recovery in the case of new municipal utilities. For example, some entities argue that the Commission does not have any authority with respect to costs in retail rate base that may be stranded as a result of the annexation of electric service territory by a municipal utility.[214] A number of petitioners also contend that municipal annexation occurs pursuant to state or local law, not federal law, and that every facet of municipal annexation, including compensation and valuation, is governed by state or local authorities.[215]

Several submit that annexation is a form of franchise competition that predated Order No. 888, that transmission access was available (though not as readily as after Order No.

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[212] As discussed above, APPA filed its request for rehearing out-of-time. Accordingly, we are treating APPA's pleading as a motion for reconsideration.

[213] *See* APPA, CAMU, IL Com, NARUC, TAPS, TDU Systems, on the other hand, argues that the *Commission should permit non-public utilities providing reciprocal transmission service to recover* stranded costs arising from municipal annexation. TDU Systems submits that allowing public utilities to seek stranded cost recovery arising from municipal annexation exacerbates the unequal and unduly discriminatory treatment accorded transmission dependent utilities and electric cooperatives.

[214] *See* APPA at p. 11-12; IL Com at 4-5; NARUC at 2-3.

[215] *E.g.*, APPA at 12-13; NARUC at 3; TAPS at 24-25. APPA objects that federal regulation of stranded costs associated with municipal annexation results in the establishment of overlapping federal/state authority that precludes the execution of state laws by state authority in a matter normally within the power of the state, in violation of the Tenth Amendment. APPA at 13.

888) for many franchise competitors utilizing annexation,[216] and that annexations have occurred and will continue to occur based upon motivations *removed from the open access regime.*[217] CAMU states that

> [a]nnexations have occurred and will *continue to occur in a[n] unbroken string* based upon motivations entirely removed from this Commission's open access regime. There is simply no reason to assume that the Open-Access Rule will accelerate the pace of annexation.[[218]]

NARUC asks the Commission to grant rehearing as a matter of policy. It argues that the Commission's assertion of authority to address stranded cost issues related to annexation will force the Commission to inject itself into state-established processes to second-guess a state commission's cost recovery determinations. According to NARUC, this will require the Commission to resolve difficult factual issues to match specific generation and transmission facilities with specific annexed customers.[219]

CAMU similarly contends that the Commission's assertion that it is the primary forum for the resolution of annexation-related stranded cost issues will introduce needless procedural complications. CAMU submits that various state-created mechanisms exist for the identification and payment of just compensation in the case of municipal annexations. It questions how the Commission will offset against stranded cost recovery

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[216] APPA at 11; *see also* NARUC at 3.

[217] CAMU at 2.

[218] *Id.*

[219] NARUC at 3-4.

any compensation provided under state law and whether the Commission will await the completion of state proceedings before it addresses the issue.[220] CAMU asks the Commission to defer to *existing state mechanisms and to be the primary* forum for the resolution of stranded cost recovery issues in annexation situations only where there is no state procedure for stranded cost recovery.

IL Com argues that determining whether the availability of wholesale open access is the principal cause of the stranding of public utility costs would be administratively difficult.[221] IL Com also submits that the Commission's expectation that parties raise retail-turned-wholesale stranded cost claims before this Commission in the first instance is internally inconsistent with, and contradictory to, its statements that it will give great weight in its proceedings to a state's view of what might be recoverable and will deduct any recovery a state has permitted from departing retail-turned-wholesale customers from the costs for which the utility will be allowed to seek recovery under the Rule.[222]

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[220] CAMU at 3-5. CAMU notes that some state *compensation* statutes require the annexing municipality to pay "expectation" damages for a defined future period based upon revenues received from the annexed area. CAMU says that this element of damage, which is applied in addition to payment for condemned facilities, is meant to liquidate claims for lost service territory, idled generation assets and other business opportunities, but the awards do not separately value each of these elements of damage. CAMU questions how the Commission is going to ascertain what element of recovery pertains specifically to stranded costs if a state has adopted this liquidated damages approach. *Id.* at 5.

[221] *IL Com at 5.*

[222] *Id.* at 5-6.

Commission Conclusion

After careful consideration of the arguments raised on rehearing, we have decided not to grant rehearing, but we do provide further clarification of our decision in Order No. 888-A to be the primary forum for stranded cost recovery in certain cases involving municipal annexation. As a policy matter, we will consider recovery of stranded costs that potentially could arise as a result of municipal annexation but only when there is a sufficient nexus in such cases to the Commission's Open-Access Rule. To clarify, this determination to be the primary forum is not a blanket determination for all cases involving annexation. A determination of what circumstances make Commission review appropriate will be made on the facts pertinent to individual cases. The Commission has limited the opportunity to seek stranded cost recovery under the rule to situations in which the availability and use of wholesale open' access transmission enable a generation customer to escape a current power supplier to obtain cheaper power supplies. Annexations occur for a myriad of reasons that may have nothing to do with seeking less expensive power supplies (for example, tax or zoning considerations or consolidation of local public services). These reasons existed before adoption of Order No. 888 and, absent the nexus to the new availability of these transmission services, would not require us to consider the stranded costs from annexation in the first instance. On the other hand, an existing municipal utility that has newly-annexed territory may use an open access tariff of the annexed customers' former power supplier. Accordingly, the Commission does not believe it is necessary to reverse its previous position that annexations may raise jurisdictional stranded cost issues but instead provides this clarification.

In the course of reviewing the rehearing petitions on annexation, the Commission has also had the opportunity to reflect on the rationale for our decision to be the primary forum

for addressing the recovery of stranded costs associated with retail-turned-wholesale customers (including a newly-formed municipal utility). We wish to further elaborate upon and clarify our prior discussions about recovery of costs stranded by retail-turned-wholesale customers.[223]

First, in setting forth our position on costs stranded in certain retail-turned-wholesale and municipal annexation situations, the Commission recognized that states may also have jurisdiction over retail-turned-wholesale stranded costs and that state adjudications of such costs may precede consideration of them here.[224] Moreover, we indicated that "we are not secondguessing the states as to what a utility may recover under state law."[225] As we stated in Order No. 888-A and reiterate here.

> Our decision to be the primary forum for recovery of stranded costs from retail-turned-wholesale customers is not intended to prevent or to interfere with the authority of a state to permit any recovery from departing retail customers, such

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[223] In so doing, we also reiterate our concern (expressed in Order Nos. 888 and 888-A) that there may be circumstances in which customers and/or utilities could attempt, through indirect use of open access transmission, to circumvent the ability of any regulatory commission—either this Commission or state commissions—to address recovery of stranded costs. *In Order Nos. 888 and 888-A,* we reserved the right to address such situations on a case-by-case basis. Order No. 888, *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 31,036, at p. 31,819; Order No. 888-A, *FERC Statutes and Regulations* ¶ 31,048, at p. 30,409.

[224] Order No. 888. *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 31,036, at p. 31,819; Order No. 888-A, *FERC Statutes and Regulations* ¶ 31,048, at p. 30,405.

[225] Order No. 888-A FERC *Statutes and Regulations* ¶ 31,048 at p. 30,405.

as by imposing an exit fee prior to creating the wholesale entity. [226]

In making this statement, the Commission clearly recognized that it may indeed be the states that first address the difficult stranded cost issues associated with the formation of new municipal utilities or other wholesale entities. The Commission contemplated then, as now, that it would nevertheless adjudicate those stranded cost issues where states lack authority to do so or where, based on the record before us, they fail to provide a forum,[227]

Second, as the Commission stated in Order No. 888-A.

if the state has permitted any recovery from departing retail-turned-wholesale customers (for example, if it imposed an exit fee prior to, or as a condition of, creating the wholesale entity], such amount will not be stranded for purposes of this Rule. We will deduct that amount from the costs for which the utility will be allowed to seek recover[illegible]nder this rule from the Commission.[228]

Further, we will take into account state findings on cost determinations associated with retail-turned-wholesale situations and "we will give great weight in our proceedings to a state's view of what might be recoverable."[229] We believe it is

[226] *Id.* at p. 30,410.

[227] *See City of Las Cruces, New Mexico,* SO FERC ¶ 61,160 (1997).

[228] Order No. 888-A, *FERC Statutes and Regulations* ¶ 31,048, at p. 30,405. *See also* Order No. 888, *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 31,036, at p. 31,819.

[229] Order No. 888-A, *FERC Statutes and Regulations* ¶ 31,048, at p. 30,405.

important to emphasize that in those instances where states do address stranded costs associated with retail-turned-wholesale customers and in cases of municipal annexation, we intend to give substantial deference to their determinations.

2. Pre-existing Transmission Rights

TAPS requests clarification that the required nexus between the availability and use of Commission-required transmission access and the stranding of costs would not be met "if the municipal utility, including as expanded through annexation, possessed rights to transmission prior to Order No. 888 and EPAct (for example, NRC license conditions and the like).[230] TAPS submits that "[t]he utility exercising these transmission rights should not be subject to stranded costs claims before the Commission simply because the municipal utility chooses to use the Commission's preferred open access tariff, instead of a bilateral or other arrangement available under pre-existing rights."[231]

Commission Conclusion

We will deny TAPS' requested clarification. The existence of rights to transmission prior to Order No. 888 would not, in and of itself, indicate that the customer should be relieved of potential stranded cost liability under Order Nos. 888 and 888-A.[232] It may be that a customer with some right to transmission

[230] TAPS at 27.

[231] *Id.*

[232] As we explained in Order No. 888-A, we declined to include "exercise of pre-existing contract rights for transmission and designation of wholesale loads" as an example of a situation for which stranded costs may not be sought because we are not prepare to make individual factual determinations in the context of the Rule. The Commission will address specific requests for stranded cost recovery on the fact presented and the merits of the particular request *FERC Statutes and Regulations* ¶ 31,048, at p. *30,358.*

service prior to Order No. 888 (for example, as a consequence of NRC license conditions), was unable to reach an alternative supplier through the use of that transmission. Thus, notwithstanding the existence of pre-existing transmission rights, and depending on the facts of a particular case, it may be that the utility incurred costs based on a reasonable expectation of continuing to serve the customer.

On this basis, the Commission will not conclusively presume that a customer with a pre-existing right to transmission service could never be subject to a stranded cost obligation under Order Nos. 888 and 888-A. Similarly, the Commission will not conclusively presume that the mere existence of a pre-existing right to transmission service precludes any reasonable expectation of continued service by the utility. However, the existence of pre-existing transmission rights, and any circumstances surrounding them, may be used as evidence in the determination of whether the utility had a reasonable expectation of continuing to serve customer.[233]

3. Load Growth and Excess Capacity

Boston Edison seeks rehearing of the Commission's finding in Order No. 88-A that "cost is not stranded if it is fully recovered the cost-based rates paid by native load."[234] submits that this phrase

> suggests that the cost of capacity released by a departing wholesale customer can and should be recovered in the rates of the remaining retail and wholesale customers if the remaining customers' load or load growth will be sufficient to absorb the released capacity . . . Such cost shifting directly

[233] *See Duquesne Light Company*, 79 FERC ¶ 61,116, at p. 61,520(1997).

[234] *FERC Statutes and Regulations* ¶ 31, 048, at p. 30,440.

> contradicts the cost responsibility principles set forth in Order No. 888 [*i.e.*, direct assignment]. [[235]]

Boston Edison objects that the rationale for this policy reversal is not articulated in Order No. 888-A.

Commission Conclusion

At the outset, we reiterate that we remain committed to the cost responsibility principle established in Order No. 888 and continue to believe that a departing wholesale customer should be responsible for the costs it stranded. Our statement that a "cost is not stranded if it is fully recovered in the cost-based rates paid by native load" was not meant to imply the cost of capacity released by a departing wholesale customer should always be recovered

[235] Boston Edison at 3.

APPENDIX G

Statutory Provisions Involved

STATUTORY PROVISIONS INVOLVED

16 U.S.C. § 824 (FPA § 201) provides in pertinent part: § 824. DECLARATION OF POLICY; APPLICATION OF PART

(a) Federal regulation of transmission and sale of electric energy

It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter [16 U.S.C. §§ 824 et seq.] and subchapter III of this chapter [16 U.S.C. §§ 825 et seq.] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce.

(1) The provisions of this Part [16 U.S.C. §§ 824 et seq.] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter [16 U.S.C. §§ 824 et seq.] and subchapter III of this chapter [16 U.S.C. §§ 825 et seq.], over facilities used for the generation of electric energy or over facilities used in local

distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Omitted.

(c) Electric energy in interstate commerce.

For the purpose of this subchapter [16 U.S.C. §§ 824 et seq.], electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale"

The term " sale of electric energy at wholesale" when used in this Part [16 U.S.C. §§ 824 et seq.] means a sale of electric energy to any person for resale.

(e) "Public utility" defined.

Omitted.

Federal Power Act, Section 205, 16 U.S.C. § 824d(e) (1992) provides:

Rates and Charges; Schedules; Suspension of New Rates

Sec. 205(a) All rates and charges made, demanded, or received by any public utility for or in connection with transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own

initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate charge, classification, or service shall go into effect at the end of such period, but in case of proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f)(1) Not later than 2 years after the date of the enactment of the subsection and not less often than every 4 years thereafter,

the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine-

(A) whether or not each clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are-

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take piace in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to-

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause, if such clause or practice does not result in economical purchase and use of fuel, electric energy, or other items, the cost of which is

included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases of decreases (or both) in cost incurred by a electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Fixing Rates and Charges; Determination of Cost of Production or Transportation

Sec. 206.(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the

refund effective date shall not be earlier then the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier that the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 205 of this Act and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonable expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with

interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) The Commission upon its own motion, or upon the request of any State Commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

16 U.S.C. §824K(h) (FPA §212(h)) provides:

(h) PROHIBITION ON ORDERS INCONSISTENT WITH RETAIL MARKETING AREAS. – No order issued under this Act shall be conditioned upon or require the transmission of electric energy.

(1) directly to an ultimate consumer, or

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless

(A) such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or political subdivision); a corporation or association that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and

(B) such entity was providing electric service to such ultimate consumer on the date of enactment of this subsection or would utilize transmission of distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer.

Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer.

APPENDIX H

H. Rep., Hearings Before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess. (1967), excerpts from Testimony of FPC Chairman Lee C. White

H-1

FEDERAL POWER ACT AMENDMENT OF 1967

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS AND POWER

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

FIRST SESSION

ON

H.R. 5348, H.R. 5637, H.R. 7799, H.R. 8426, H.R. 8919, H.R. 9174

BILLS TO AMEND THE FEDERAL POWER ACT, AS AMENDED, IN RESPECT OF THE JURISDICTION OF THE FEDERAL POWER COMMISSION

NOVEMBER 1, 2, AND 3, 1967

SERIAL NO. 90-49

PRINTED FOR THE USE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

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STATEMENT OF HON. LEE C. WHITE, CHAIRMAN, FEDERAL POWER COMMISSION; ACCOMPANIED BY F. STEWART BROWN, CHIEF ENGINEER, BUREAU OF POWER; RICHARD A. SOLOMON, GENERAL COUNSEL; AND DAVID J. BARDIN, ASSISTANT GENERAL COUNSEL

MR. WHITE. Thank you, Mr. Chairman. I have with me to help on any particular questions that may occur—and would like to have them sit at the table if possible—Mr. Stewart Brown, the Chief Engineer of the Federal Power Commission and the head of our Bureau of Power; Mr. Richard Solomon, the Commission's General Counsel; and Mr. David Bardin, the Assistant General Counsel who works on legislative problems for the Commission.

We at the Federal Power Commission, Mr. Chairman and other members of the subcommittee, regard this as an exceedingly important hearing. We are grateful for the opportunity to be here. I have quite a detailed statement. It would be my preference to read it. If, however, it is the preference of the chairman that we do it on a briefer basis, I can go through the highlights or present it in summary fashion.

MR. MACDONALD. Actually, Mr. White, since the proponents have been heard at length, I think it would be very well for you to read it and give us the benefit of your views on this subject.

MR. WHITE. Thank you, Mr. Chairman.

MR. MACDONALD. But I will defer to your wishes, whichever way you want to do it.

MR. WHITE. And quite obviously, even though it set up so that we hope that it flows in some logical order, it may well be appropriate and helpful if there are questions that occur for me to be stopped and we will do our best to answer those.

MR. MACDONALD. Right.

MR. WHITE. I appreciate the opportunity to present to you. Mr. Chairman and members of the committee, the views of the Federal Power Commission on H.R. 5348 and the identical companion bills. I should like to examine these bills in a somewhat broader context than their immediate effect on the regulation of the rates and accounting of interstate electric utilities. For these bills would not merely provide an exemption for certain public utilities from rate and accounting regulation by the Federal Power Commission; they would also in our view

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turn back the clock on the progress the electric utility industry is now making toward lower costs and greater reliability. We therefore oppose the enactment of H.R. 5348 and I should note that this opposition to the bill is unanimous within the Commission.

These bills are before the committee today against a background of sweeping technological changes in the electric power industry. That industry is moving rapidly toward greater regional interdependence, cutting across State lines.

This trend toward greater complexity and integration has resulted in other legislative proposals, principally directed toward channeling into the most productive courses the useful progress the utility industry is making.

The proposed Electric Power Reliability Act, introduced by Chairman Staggers as H.R. 10727 and by Chairman Macdonald as H.R. 10721 represents, we believe, a realistic and constructive and constructive reaction to the changes taking place in the power industry.

Interconnections, direct and indirect, among utilities are a far more vital part of the industry's operations today than ever before, and they will be still more vital in the future. Reliability and the economies of scale newly available through use of large generators and long-distance EHV, extra-high-voltage, transmission technology demand that utilities coordinate closely, not on a local or intrastate but on a regional scale.

The Electric Power Reliability Act is intended to facilitate this broad-scale coordination. H.R. 5348 would make it, in many if not most cases, virtually impossible. We believe it would deserve the national interest to induce managements to fragment their operations and neglect opportunities to assist other systems and improve their own service by coordination with their neighbors.

We believe this would be the inevitable consequence if H.R. 5348 were enacted. The commitments the industry is now making indicate that the Electric Power Reliability Act is needed to hasten industry progress. Enactment of H.R. 5348 would in our view be a giant step backward.

WHY COORDINATION IS VITAL

The President's consumer message, transmitted February 16 of this year had the following observation and then I should like to quote from that message:

"It is becoming increasingly clear that greater coordination is needed among the various (electric) utilities to reap the benefits of reliability and economy inherent in huge generating units and extra-high-voltage transmission lines. It is also becoming evident that power systems must be carefully planned, coordinated, and strengthened to protect the consumer against cascading power failures."

The President there announced that proposed legislation would be forthcoming. In response, the Commission submitted to Congress the proposed Electric Power Reliability Act and we believe that proposal will help the power industry move toward greater cooperation and coordination.

While some elements of the industry have expressed serious doubt whether various provisions of the reliability bill will achieve their stated objectives, there has, to the best of my knowledge, been no significant disagreement with the aim of greater reliability and economy

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through greater idnsitry coordination and joint planning which the bill seeks to achieve.

If I may depart from the prepared text, I have been advised that yesterday there was some discussion here before the committee to the contrary by representatives of one of the great power companies in this county.

I have not yet had a change to examine it but I may say so far as I am aware that is the first major utility to make that position. We would like to examine it and I would certainly point out to the committee that the report prepared by an industry advisory committee which was incorporated into the Federal Power Commission's report of July this year as volume 2 is quite to the contrary. It is a lengthy volume. I don't know that it would be appropriate to incorporate it in the record, but I can certainly commend it to the attention of the committee and to all who are interested in this industry.

That report was not prepared by the Federal Power Commission or its staff. It was prepared by an industry advisory committee and takes the view that I have set forth in this prepared statement.

Regional coordination is generally recognized as a national need if greater service reliability is to be realized. As the map on the easel demonstrates, cascading power failures—which do not respect State lines—have occurred in every section of the country. The Northeast blackout of November 1965 and the Middle Atlantic failure of June 1967 were the most striking examples of this kind of interruption.

To reduce the likelihood of these massive outrages, the Commission's Advisory Committee on Reliability of Electric Bulk Power Supply, the group to which I just alluded, composed of outstanding experts from all segments of the utility industry, has urged that:

The electric power industry should pursue every opportunity to accelerate the development of properly planned interconnections among individual systems.

Regional coordination among such individual systems also should be vigorously pursued since such coordination offers the most effective and economical means for assuring bulk power supply reliability for the Nation.

And further, the committee advocated:

The development of contractual arrangements to formalize the purposes, functions, organizational structure and procedures for carrying out effective regional coordination.

Thus, large-scale coordination is not an invention of the FPC which we are attempting to force on an unwilling industry. On the contrary, leaders in the utility industry, with only a few exceptions, have voluntarily committed their companies to such cooperative and interdependent action. The report of the FPC's Advisory Committee on Reliability makes clear that coordination of a type, and on a scale, utterly inconsistent with the assumptions of H.R. 5348, is needed for greater reliability in the power industry.

MR. MACDONALD. Mr. Chairman, since you asked for interruptions a question occurs.

MR. WHITE. Yes, sir.

MR. MACDONALD. Of course I agree with everything you said so far.

MR. WHITE. Yes.

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MR. MACDONALD. The question that occurs is it is not what the future holds, but what the present law is, and if you could address yourself—perhaps you do later; I don't know—to the present law covering this situation I think it would be helpful.

MR. WHITE. My statement does, Mr. Chairman, get to that. By way of introduction, however, we have regarded this hearing as an excellent opportunity to in effect focus on what we regard as the other side of the coin.

I am glad indeed that some of the witnesses that you heard yesterday spoke about the impact on reliability because we believe that this is at the heart of the matter.

There are of course other aspects of it that do present themselves and we have our accounting problems, we have our financial surveillance, we have the question of rates, all of which are important, but in all candor the most important is that involving reliability in our view.

I think that I will probably touch upon that in a little more full fashion than I could otherwise do extemporaneously, but if that is agreeable I will continue.

MR. MACDONALD. Thank you.

MR. WHITE. Returning to page 5 of the text, I find it difficult to believe that the Congress of the United States would want to reject the progress of the last few years and encourage a weakening of coordination and interconnection.

HOW H.R. 5348 WOULD INHIBIT COORDINATION

The goals of adequate interconnections and sound, comprehensive contractual agreements governing coordination for reliability and economy would be far more difficult to achieve if H.R. 5348 were law.

This is so because that bill would discourage direct interconnection and full participation in interstate pools by exempting any public utility "none of whose facilities is used to transmit or receive electric energy by direct connection form or to a State other than the State in which such facilities are situated."

What is more, some utilities would be discouraged from joining reliability arrangements binding many indirectly connected utilities by the provision that the exemption shall not be available to a utility "any part of whose facilities are used to transmit or receive energy under contract with a public utility or other entity in another State."

This effect of the bill may be illustrated by the situation of the major electric utilities in the Southeastern States today. The companies in Florida have the opportunity to seek admission to a major coordination effort, the so-called CARVA-Southern

System Reliability Agreement entered into by the members of the CARVA pool, and the Southern System, a holding company controlling operating utilities in Alabama, Mississippi, Georgia, and the Florida Panhandle.

The CARVA-Southern Reliability Agreement, while undoubtedly not constituting the optimum form of regional coordination for the Southeast, represents an important and useful start in the area's progress toward regional coordination.

In all likelihood, the Florida utilities belong, as a matter of power system engineering, in this coordination group, but they have not

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joined, and enactment of H.R. 5348 would certainly tend to inhibit two of them, Florida Power & Light Co. and Tampa Electric Co., from joining in the CARVA-Southern Agreement; that is, they will not "contract with a public utility * * * in another State", as H.R. 5348 phrases it, for fear of losing the promised exemption.

Even if some way could be devised to permit their participation without contracting with the out-of-State members of the agreement, the engineering efficiency of the coordination would be impaired by H.R. 5348.

Thus Florida Power & Light Co.'s service area adjoins directly that of Georgia Power Co., a participant in the CARVA-Southern Reliability Agreement, and Florida Power & Light is the largest utility in florida (and of course one of the largest in the Nation).

Yet there is no direct interconnection between Florida Power & Light and Georgia Power across the State border, and none would be likely, if H.R. 5348 were enacted, no matter how advantageous it might be operationally.

The 1964 National Power Survey report undertaken by the Federal Power Commission in cooperation with the industry and the Commission's report this year that I mentioned earlier on prevention of power failures, indicated the desirability of

stronger ties connecting the Florida utilities to the North and West. Thus the legislation before the subcommittee today would retard the progress of coordination for reliability even in the absence of reliability legislation.

NATURE OF H.R. 5348 AND RELATION TO PENDING COURT CASES

H.R. 5348 would amend the Federal Power Act to create a total exemption form parts II and III of the act for certain public utilities meeting the criteria listed by the bill.

Exactly how many companies would be exempted cannot be predicted, because of some unclear language in the bill. It is certain, however, that public utilities in many parts of the Nation could seek exemption of H.R. 5348 were enacted. The commission's report and analysis of the bill, previously submitted to the committee, discuss the language of the bill and attempt to interpret its meaning. I request that they be made part of the record and I presume that this has been previously discussed in yesterday's hearing.

We are not sure, Mr. Chairman, whether the Commission's formal report to the commerce Committee was actually discussed yesterday and made a part of the record. If it was not we believe that it would be a useful addition to the record of these hearings and so request.

(See FPC report and analysis of H.R. 5348, p.2.)

MR. BROTZMAN. Mr. Chairman, I would like to see it now. Do we have it around?

MR. WHITE. I think now, Mr. Chairman, we are approaching that portion of this prepared statement that addresses itself to the matter you raised.

In a sense H.R. 5348 may be regarded as addressed to an FPC case involving the jurisdictional status of Florida Power & Light Co. It is not my purpose here to discuss any particular case. Earlier this year the Commission concluded (two

Commissioners dissenting) that Florida Power & Light Co. is a "public utility"within the meaning of the

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Federal Power Act and therefore subject to the Commission's existing jurisdiction under parts II and III of the act (37 FPC 544).

The company has petitioned for judicial review of the commissioner's decision, as is its right. Pending final disposition of the appeal, the Commission has stayed its order. In view of the pendency of the appeal obviously I cannot discuss the merits of the Commission's decision on the status of Florida Power & Light under existing law and I do not believe this subcommittee would wish me to do so.

H.R. 5348 also proposes to write into the Federal Power Act an exemption for all cooperatives financed by the Rural Electrification Administration. While such legislation was sought by most of the cooperatives of the Nation during the 89th congress, when the issue of FPC jurisdiction was pending in the so-called *Dairyland* case, that issue was resolved by the Commission, at least so far as the Commission's jurisdiction to make this determination was concerned, in an opinion earlier this year (30 FPC 365).

We held that REA co-ops are not exempt from the Federal Power Commission's jurisdiction. That matter has also been taken to the Court of Appeals in a related case, and the Commission believes that no such legislation concerning jurisdiction as it proposed in H.R. 5348 should be considered at this time.

The Commission has expressed the unanimous belief that there should be appropriate Federal regulation of generation and transmission cooperatives which transmit energy in interstate commerce, but that distribution cooperatives should not be subject to Federal Power Act regulation.

I should note that in that particular case there was one member of the Commission that dissented on the jurisdiction

over cooperatives. I think it is fair to state that with respect to the existing law it is possible for reasonable people to examine the very same fact situations, to hear the argumentation, the analysis that is set forth, and then reach conflicting views.

The way our system operates, and so far as we are concerned it is the way that it should operate, any party that is dissatisfied with a determination by the Federal Power Commission is entitled as a matter of legal right, statutory right, to appeal directly to the Court of Appeals and there contend that the Commission or a majority of that Commission was in error.

Subsequently, even if that proves to be unsatisfactory to the party, there is the opportunity to appeal to the U.S. Supreme Court. Clearly that is not the end of the route either insofar as solving a particular problem. It is the end of the route insofar as interpreting existing language.

If, however, the Supreme Court comes with a decision that is unpopular or unacceptable to a group or one individual there is then the opportunity to petition the congress to change the law, assuming that it is consistent with the Constitution.

We have here, therefore, two separate instances in which five members of the Federal Power Commission have split on the precise meaning of a section of one of the acts that we administer. We think it, therefore, perhaps would be wiser that there be no action until such time as the courts have resolved this issue or these issues.

Really there are two of them, one involving the Florida Power & Light situation and the other the co-op situation. Both of them now

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are actively under judicial review and it is for this reason that we, regardless of the position that we took on the precise meaning of today's statute, believe that this legislation is at best untimely and, as my statement indicates, we believe also that is is unwise, but I hope, Mr. Chairman, I have responded to the question you have raised.

Significantly, H.R. 5348 is not being supported by the National Rural Electric Cooperative Association, an organization which did indeed support legislation in earlier Congresses to exempt co-ops expressly from certain sections of the Federal Power Act.

Nor so far as we are advised, has it been endorsed by the Edison Electric Institute, a privately owned portion of the industry, or the American Public Power Association. Also, the National Association of State Commissions is not supporting this legislation to completely exempt some utilities from the Federal Power Act.

Moreover, as my letter transmitting our report to the committee indicates, the Bureau of the Budget has advised that enactment of H.R. 5348 would not be consistent with the administration's objectives.

THE EXEMPTION PROPOSED BY H.R. 5348 IS UNWARRANTED

H.R. 5348 would exempt public utilities which transmit electric energy in interstate commerce but only through the facilities of other corporate entities and without any contractual dealings with companies in other States.

As I have indicated, any such test of jurisdiction is retrogressive in its effects upon useful interconnection and regional planning. But even in its own terms we do not believe it makes sense.

Specifically, we believe that the regulation of utilities operating in interstate commerce provided by parts II and III of the Federal Power Act is necessary and beneficial to the public and the companies.

If we are wrong, as to that, and the regulatory scheme of the Federal Power Act is obsolete or unnecessary, it should be changed or abolished across-the-board and not just with respect to companies who engage in interstate commerce in the manner prescribed by H.R. 5348.

In short we believe that would be a highly artificial distinction.

Parts II and III of the Federal Power Act were parts of the Wheeler-Rayburn Public Utility Act of 1935, enacted in recognition of legal and practical limits on unaided State action and as a corrective to widespread abuses in the power industry.

The 1935 act, therefore, placed electric utilities engaged in interstate transmission or sale of energy under Federal regulation. The act was premised on the need for a permanent system or utility regulation governing operating companies transmitting or selling energy in interstate commerce.

Let me state clearly that parts II and III of the Federal Power Act do not now apply to utilities which operate purely in intrastate commerce, in isolation form interstate networks. (By way of contract, the part IV of the Federal Power Act proposed by our Electric Power Reliability Act would include such companies, as well as the exempted Federal, cooperative, and municipal systems for the special purposes of that proposal.)

H.R. 5348 proposes to exempt from parts II and III certain additional companies which do transmit electricity in interstate com

merce. When proponents of the bill say it would exempt purely "intrastate utilities" they mean that the exempted corporations would be those owning facilities entirely within a single State, even though all or a major portion of their operations could be in interstate commerce.

The dominant rational advanced for H.R. 5348 is that it will remove from Federal jurisdiction matters concerning only the States, and allegedly so treated until recent decisions of the FPC.

However, H.R. 5348 would not have any such limited effect in our judgment. It would remove from Federal jurisdiction public utilities which sell electric energy in interstate commerce under circumstances held by the Supreme Court to give rise to Federal jurisdiction a quarter of a century ago in one of the

earliest cases decided under the Federal Power Act. This is the Jersey Central Power & Light Co., the decision by the Court in 1943.

The National Association of State Regulatory Commissions (NARUC) is not supporting the jurisdictional formula proposed by H.R. 5348. As I shall show, present FPC jurisdiction assists the States in carrying out their vital functions and H.R. 5348 would deny valuable Federal support to State regulatory programs.

Congress in 1935 believed Federal Power Act jurisdiction to be essential in three principal areas for effective regulation of electric utilities: First, wholesale sales in interstate commerce; second, financial operations and books of account; and third, interconnection and coordination of public utilities.

Congress directed the Commission to encourage voluntary interconnection and coordination, also giving it compulsory authority, upon application by a utility or a State commission, to order jurisdictional public utilities to interconnect with their facilities with other electric systems and sell or exchange energy with them.

At the same time, Congress carefully preserved the States' essential regulatory authority over matters of local import. For example, parts II and III of the Federal Power Act do not assign to the Commission any authority over retail rates; this State function covers more than 90 percent of the electric revenues of jurisdictional public utilities. States also may invoke the processes of the FPC to assure adequate interstate wholesale service.

The exemptions contemplated by H.R. 5348 could leave the Commission in the anomalous position of having jurisdiction over some investor-owned members of an interconnected network and without jurisdiction over other member of that same network.

In the same situation the small systems near the service areas of the exempt companies and the interested State commissions would have no way of seeking the Commission's help in

securing permanent interconnections and, thereby, participation in pooling on a nondiscriminatory basis, since section 202(b) of the act authorizing compulsory interconnection would no longer be available.

H.R. 5348 could exempt even utilities which were integral parts of interstate systems and even if their basic function were to generate and supply energy to out-of-state utilities as long as they did not contract directly with out-of-State entities.

Exemption could be available irrespective of the extent of the inter-state transactions engaged in, the size of the companies affected, the

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number of wholesale customers dependent on them for power supply, and whether or not they were otherwise subject to wholesale rate regulation, uniform accounting, or other corporate supervisions.

In 10 States no regulatory agency would regulate the wholesales, proposed to be exempted by H.R. 5348—these are wholesales—by privately owned utilities to municipal or cooperative systems.

In any event, the engineering and financial ramifications of wholesale power transactions often extend into other States, where lack of jurisdiction and division of responsibility may make the State regulator's task impossible. It is far easier for the specialized electric rate section of the FPC to deal with the particular problem involved in wholesale rates such as firm service, emergency service, supplementary and deficiency energy, spinning reserve, reserve capacity, standby reserve, wheeling service, seasonal interchange, and economy energy.

Other difference between wholesale and retail sales concern the relationship of the parties. To a large electric utility, even a major industrial establishment is simply a retail customer. Customers who purchase power for resale, however, are often competitors, actual or potential, in the area where the two

systems are contiguous, as well as for the commercial and industrial customers.

Wholesale rate regulation raises peculiar problems which are difficult to meet in the absence of an adequate staff, expert in special wholesale rate problems.

It has sometimes been urged that compliance with the Commission's accounting requirements would be unduly burdensome and would duplicate State commission regulation. As I shall explain, we believe these arguments are based on misinformation; the experience of those utilities which now comply with FPC regulations does not support this claim.

We agree with the proponents of this legislation that "public utilities" within the meaning of the Federal Power Act are subject to accounting regulation by both the FPC and the State utility commissions.

In this respect the accounting situation differs from rate jurisdiction, where the States regulate retail sales and the FPC regulates wholesales. But as Speaker Rayburn recognized when, as chairman of this committee, he sponsored the present system in 1935, dual accounting jurisdiction strengthens both Federal and State regulation; it has generated Federal-State cooperation rather than wasteful duplication.

The system of accounts and financial reporting in general use in the State is virtually identical with that of the FPC. It is the product of joint study by State and Federal regulatory accounts. Formal interpretation of the accounting systems are closely coordinated through a joint State-Federal committee of NARUC.

Audits of individual companies' books are also coordinated. The effectiveness of our auditing program has materially helped the State commissions.

Whenever possible, joint teams of Federal and State accountants conduct audits. We also provide for State agency review of all our audits before they are made final. I have yet to see a State commission dissatisfied with the cooperative auditing arrangements wee share.

Thus, although the phrase "dual accounting jurisdiction" may at first raise questions, the practice, which is long standing now, is widely

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appreciated as an effective combination of the resources of both levels of government.

It may also by appropriate to comment on a claim by Florida Power & Light Co. of the high cost of compliance with FPC regulations. The Florida Public Service Commission has required Florida Power & Light to comply with the almost identical NARUC system of accounts, identical to that of the FPC's uniform system of accounts.

The Florida commission system is now being amended to require a breakdown into units of property and continuing property records. Moreover, in 1943, the Securities and Exchange Commission acting under the Public Utility Holding Company Act, required the company to put its books on an original cost basis and to eliminate all write-ups form the company's capital accounts.

Under these circumstances we can see no basis for the claim that compliance with FPC accounting regulation by the company will be burdensome or cost anything like the sums which have been discussed in the company's testimony before the Congress.

Certainly there is no merit to the only specific claim that has been made—that the company would be required to undertake an expensive aerial survey of its facilities. We have repeatedly made clear it will have no such obligation.

In sum, therefore, the Commission urges this subcommittee to uphold the goals of the Federal Power Act by rejecting H.R. 5348. The Electric Power Reliability Act, which is also pending before the Committee on Interstate and Foreign Commerce, suggests the direction in which most of the power industry is moving, as well as the legislative response we think is appropriate.

H.R. 5348 and the other identical bills, on the other hand, would withdraw regulatory protection to which the American consumer is entitled, and hamper the power industry's progress toward better service and a more abundant supply of low-cost power for this Nation. The Commission is unanimous in judging that none of these bills be enacted.

Thank you. Mr. Chairman. That does conclude the formal statement. There is attached a copy of a map (fig.1) of the CARVA Southern System to which the statement does allude and I would hope that, too, could be incorporated into the record.

MR. MACDONALD. Without objection it is so ordered.

(The map referred to follows:)

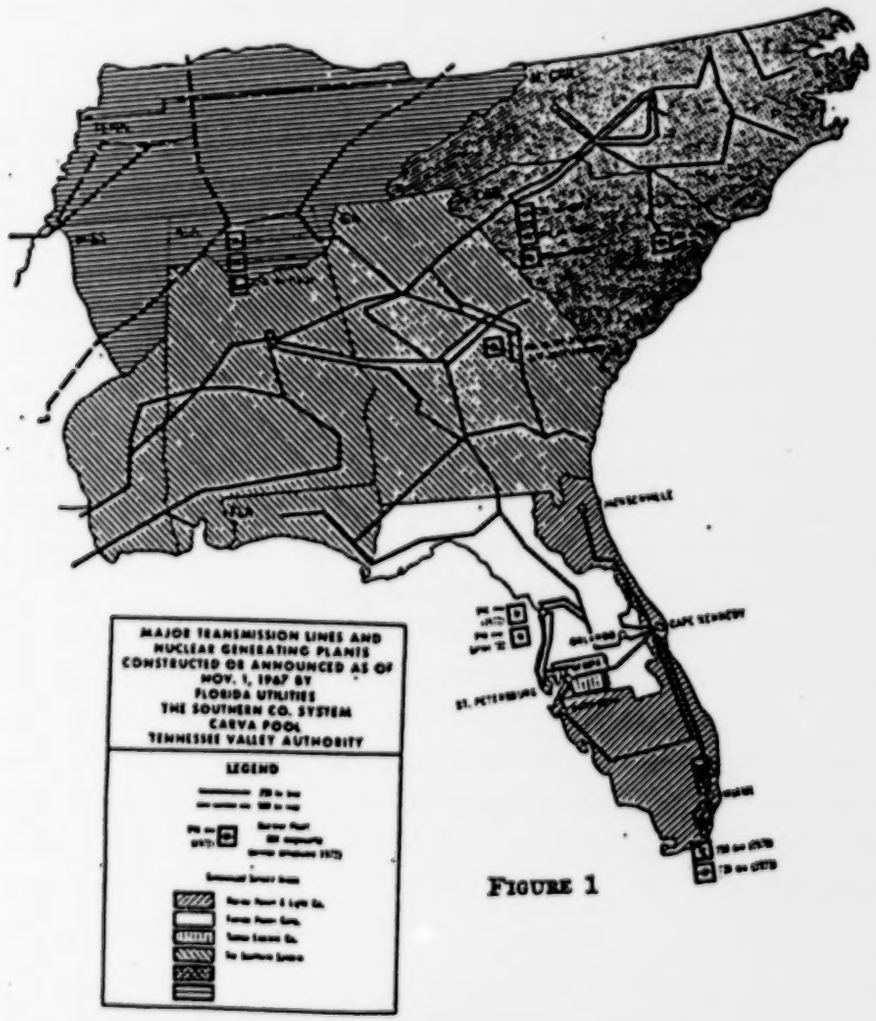

FIGURE 1

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MR. MACDONALD. Thank your very much, Mr. Chairman. I just have two very short questions because you have answered many of the questions that have been raised yesterday and some today.

On page 7, however, I can't quite understand your statement, or at least the Florida Power & Light Co.'s position, that if this bill H.R. 5348 were enacted they would not take advantage of the operational benefits that they might have in joining up with Georgia.

Why wouldn't they want to have benefits of operation between the Georgia Power and Florida Power?

MR. WHITE. I do understand the question and I can say that it is somewhat presumptuous to make a forecast as to how any utility management will operate in the future, particularly with the way technology moves, but the way H.R. 5348 is set up if there is a utility that seeks desperately to avoid FPC jurisdiction, and there is a way that it can be done, and that way is disadvantageous to its own customers, to the need for reliable service of systems that are elsewhere in the region, we would hate to see some sort of an inducement to companies to sort of adjust their operations to the point where they can secure the exemption.

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I think I should note that we have had an excellent illustration of where this has gone the other way. For a number of years the Detroit Edison Co., operated its system in such fashion that it was not jurisdictional. Within the past year or so it has concluded that, despite whatever disadvantages they may believe are inherent in FPC jurisdiction the advantages to their own system stability, to the ability to provide reliable service and economical service, are so overwhelming that they are willing to accept whatever burdens come with FPC jurisdiction, and it may well be that under circumstances that will evolve in the future even if H.R. 5348 were enacted that the management of

a particular utility would believe that it is worth the natural advantages to pay whatever psychic price or whatever financial price is involved in the FPC jurisdiction, and I could say almost in defense of the Commission we don't regard it as such a heavy burden or such a penalty.

We think there are considerable advantages that go with FPC jurisdiction. I wouldn't expect that to be a universal view, but certainly we believe, and I think that it is true, that there are many other observers of the industry, including come participants, who have seen some considerable benefit from regulation.

Only yesterday at the meeting of the National Association of State Regulatory Commissions the chairman of the Michigan Public Service Commission gave a rather powerful talk in which he said that he believed it was absolutely essential that the State commissions undertake to do more, that they had sort of left a great deal of the work to Federal agencies, and said that quite honestly he believed that if the States did not do more, if the State commissions and association did not do more, it was inevitable that the Federal Government would move in to solve national problems.

I can't say that this means that he is endorsing our electric reliability, that he is supporting this act, but his theme I thought was well taken and demonstrates that there it a vital role to be played by regulation.

MR. MACDONALD. My last question is, What is the role—I am trying to reexamine it—between the FPC and, say, the Public Utilities Commission of Massachusetts?

MR. WHITE. Under our existing legislation the State commissions including Massachusetts, are entitled to come before the FPC to allege discrimination, to seek our good offices and our procedures for resolving difficulties.

We have, I think, in the past few years seen an increasing working relationship with them. For example, in the work on our National Power Survey we have had serving on our industry advisory committee representatives of the State commissions.

We have, additionally, found ourselves cooperating with them in a lot of specific situations. The one that most recently comes to mind is the Middle Atlantic power failure of last June. We have had a joint meeting, for example, at the Federal Power Commission, meeting with the chairman of the Pennsylvania Commission, the Maryland Commission, the New Jersey Commission, the District of Columbia and the Delaware Commissions, in an effort jointly to pool whatever technical competence we have and the industry has so that our efforts will be harmonious and hopefully cumulatively better than they would be individually.

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MR. MACDONALD. One of the reasons I ask is I am sure you are aware that Massachusetts has been plagued with these blackouts and Senator Edward Kennedy brought this forcefully to the attention of the Senate and at one point I thought that the FPC was about to take some steps to have the Massachusetts Public Utilities Commission take some action with the utilities in Massachusetts. I was wondering if anything ever happened in that field.

MR. WHITE. The State legislature, Mr. Chairman, set up a special committee headed by State Senator Rurich and by Representative Rorick and we have met with those gentlemen and have indicated that within the budgetary limitations of our own Commission we would indeed be glad to provide some technical competence, staff competence, to assist them.

Nothing definite has yet been worked out, but we have been in communication with then and I believe that this is an appropriate manner in which the Federal Commission can cooperate, can assist, State agencies.

MR. MACDONALD. Am I correct in assuming you can't tell the State agency what to do?

MR. WHITE. You are correct, Mr. Chairman. We do not have that authority.

MR. MACDONALD. You can merely advise and counsel.

MR. WHITE. Yes, and in all fairness I think the State commissions have been quite enthusiastic about working with us and reviewing our reports. As you may recall, we recently issued a report on the Cape Cod power failure of last summer and we have consulted with the State commission prior to the release of that.

We are hopeful that the suggestions that were contained in that report will be acted upon by the company and that if indeed they are not acted upon by the company the State commission will itself exercise whatever authority or prerogatives it possesses to achieve reliable service for the people of Cape Cod as well as elsewhere in Massachusetts.

MR. MACDONALD. I would frankly doubt that that ever comes into being, but I hope your are right. Mr. Kornegay?

MR. KORNEGAY. Thank you, Mr. Chairman. Mr. White and members of the Commission, it is certainly a pleasure to have you here with us this morning and you made a very fine statement for your position. I have a few questions I would like to ask.

Mr. White, is it your opinion, the opinion of the Commission, that it would be to the advantage of Florida Power & Light to be intertied or interconnected with Georgia companies?

MR. WHITE. I understand the question completely and it is the easiest one I am going to get all day. The answer is yes.

MR. KORNEGAY. Well, I just wanted to know because there is so much controversy about it, about that particular thing, but the reason I guess the point is controversial is, it would appear to me—just looking at the geography of it—it would be much more to the advantage of south Florida being tied in than it would be to Georgia.

They are isolated, so to speak. I really wanted to find out what your opinion is. The thing that sort of troubles me about this particular controversy, that is, assuming as you have, that it would be to the advantage of the South Florida Co. to be intertied with Georgia and

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yet they are unwilling to do that because it would definitely bring there under the regulation of the FPC.

MR. WHITE. Yes, sir.

MR. KORNEGAY. Now, you have a fine commission. I am sure that the leadership of that great company is fine and all of you are dedicated to the public interest and I have no quarrel or no reason to believe otherwise.

Why would they take the position that it is a disadvantage, assuming that it is, that it is not worth whatever they have to go through to come under the regulation of the Federal Power Commission the point is that there is something wrong somewhere when reasonable men, assuming all of you see this advantage, can't get together on the procedures of the thing.

Are your rules and regulations so onerous that they outweigh the advantage they might gain by coming under the authority of the Commission?

MR. WHITE. Well, I make a claim to objectivity, Congressman but I couldn't really answer that without my biases and prejudices in favor of the Federal Power Commission procedures.

We honestly do not believe that the burdens are so onerous or ind that the burdens are not greatly outweighed by the advantages. I am in a delicate area now. I have participated in a decision in which there was a controversial issue. It was the heart of the controversy. I have taken my stand.

As you suggest, there were two other members of out five-man commission who had a different view and they are as honorable as I. I don't claim to have a greater public interest blood coursing through my veins than they have, and they reach a different conclusion.

But it is before the courts. I don't know what the court of appeals or the Supreme Court will do, but it is conceivable that they will return that case to the Commission. It is possible it could happen. If it does, I may be called upon to express an opinion a second time on it, so I want to be very careful that I

don't get myself into a position where I have prejudiced all of these issues, so I am apt to be a little delicate but I can still answer your question I think in a manner that may be satisfactory to you.

On the decision made by management—and frankly we in our reliability bill and this bill and in every public utterance by every member of the Federal Power Commission believe the responsibility must remain with management. Ownership or the control in the case of the TV they are a management just as much as the president and the board of directors of the Florida Power & Light, as are the members of the boards of the cooperatives.

They must make the decision. I believe that it is reasonable to resist regulation because you know what you have and you don't know what you might get, and we do not take it personally and we have had many people say to us, "You are five fine outstanding fellows, nothing personal, but you won't be here forever and maybe 10 years hence there will be some fellows who aren't so fine," so we try to depersonalize the matter, and I don't think this is involved, either.

But there is the natural tendency of anyone who is in the business, to resist having someone else tell him how to run his business, to look over his shoulder. I believe that is it.

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MR. MACDONALD. Would you yield?

MR. KORNEGAY. Yes.

MR. MACDONALD. Actually, Mr. Chairman, I ask the president of the company—I don't think Mr. Kornegay was here when I asked him—it isn't resisting regulation really, is it, because they are regulated by the Florida Board?

MR. WHITE. Only partially, Mr. Chairman, in the sense that the Florida commission does not have jurisdiction over wholesale sales, so that is a significant factor.

MR. MACDONALD. And I would just like either an affirmative or a negative answer. The witnesses said—forget

which one, the president or the vice president of the company—said that one reason was that when they are subject to audit by the FPC they have to account for the cost of a telephone pole on Fourth Street in Miami and they say it makes it very difficult for them to make an accounting of what it costs.

They said under the State regulation they only had to account for an area.

Now, is it true that in your auditing system they have to account for what a light pole costs? I could barely believe it, although they are both very honorable men. I am not taking sides on it.

MR. WHITE. I understand the question.

MR. MACDONALD. I could hardly believe that the FPC audit would be that finite.

MR. WHITE. Our uniform system of accounts was developed with the States and in consultation with them. It is my information that the Florida Public Service Commission has recently amended its procedures to track exactly those of the FPC, or virtually exactly that of the FPC, on this matter of property inventory, so that whatever extra burdens there might have been, and I don't really believe that they are very great and I will get to that in just a moment, they are now the same, so if that might have been true 5 years ago, if our information is correct, it is not true today.

As to the cost, this was an item that was discussed and I will tell you frankly I was a little shocked when I hear that jurisdiction or nonjurisdiction might mean as much as $4 or $5 or $6 million to a company. We are not very enthusiastic about adding to the cost of an operating company. We pride ourselves, as does the industry, in trying to lower cost, and it sort of startled me and stunned me a bit to believe that it would have been at all conceivable, so I asked the chief accountant of the FPC to let me have some information: Was this accurate? Was it a rough estimate that was valid?

He came back and said he hadn't the remotest idea where the figures had come from. His estimate was, and he is physically

present in the room today, somewhere between $20,000 and $25,000 for the first year of adjustment and that it would be less after the first-year procedures had been employed.

MR. KORNEGAY. Let me interrupt, Mr. Chairman, and say if I recall the testimony not only was there the initial cost of several million but an annually recurring cost of between $500,000 and $600,000.

MR. WHITE. Those were the figures. That is correct. Those are the ones, Congressman, that shot me into our accountant's office to find out if this was accurate.

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MR. MACDONALD. Isn't it a fact that even this $25,000 or $30,000 that might be charged to the company is passed on under the rules governing utilities to customers?

MR. WHITE. Yes, sir.

MR. MACDONALD. Isn't it capitalized?

MR. WHITE. Yes, sir.

MR. MACDONALD. And aren't they guaranteed a 6-percent return?

MR. WHITE. Those are operating expenses and of course are absolutely proper to be charged to the ratepayers, and we would be very sensitive indeed to be adding millions of dollars on the ratepayers' backs for something that is not required.

May I say that our chief accountant wrote a letter to the vice president of the company whose responsibility it is to come up with financial figures, offering to sit down and to discuss how we could be so far apart because it doesn't seem quite reasonable.

I have the same problem that the Congressman did, that rational human beings could find themselves in such different ball games with one in the millions and the other in the tens of thousands, and we have not yet had that meeting.

MR. MACDONALD. Thank you.

MR. WHITE. If I may, to keep this in perspective, the utilities in North Carolina and Massachusetts are paying whatever extra

cost there is. We don't think it is very great. The fact of the matter is we don't think this is so disadvantageous and the advantages might offset it and it is a net gain, but I wouldn't even make that claim. But we have not had any cries of outrage from utilities or from the State commissions who have, after all, a responsibility to see to it that the rates that their own citizens pay are as low as consistent with sound operating practice and I can't believe that a State commission wouldn't be knocking on the doors of the Congress if we were imposing such onerous burdens as a result of our regulation.

As you can tell, we do get kind of steamed up about the issue and I agree, Congressman, that on the face of it it looks kind of hard to reconcile what you have heard one day from the next day.

MR. KORNEGAY. What disturbed me was, if there were definite advantages and yesterday conscientious and dedicated people were unwilling to accept those advantages because they were saying, it seemed to me, the disadvantage was greater than the advantage they were going to receive. That was the only conclusion I could come to.

You mentioned North Carolina. As I understand it from this bill and from the prior testimony it would have no effect on any of the utilities in that State.

MR. WHITE. That is correct. My guess is if it were enacted that there would be probably no utilities in that State who would want or would be capable of adjusting their operations so as to be eligible for the exemption offered by this bill.

MR. KORNEGAY. You make reference to the CARVA pool, which composes the four utilities in the three-State area there. How is the CARVA pool working down there?

MR. WHITE. I think if you don't mind I would like to ask Mr. Brown, our chief engineer, to speak briefly to that, but generally we have seen in this country, and again not because of the wisdom of the Federal Power Commission, but because of the judgment and the

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experience and the wisdom of those who operate utilities, that it makes a great deal more sense for them to coordinate and to integrate their operations so they mutually help one another. They not only afford reliable service but most of the time more economical service.

It makes good operating sense. As to how CARVA is coming along, Mr. Brown, who is our chief engineer, does work with these people in the various regions and he may have a word or two on that.

MR. F. STEWART BROWN. The CARVA pool agreement is a rather broad agreement between four of the major utilities in the Southeast and it covers the whole field of generation and transmission, the matter of interconnections, the matter of strengthening interconnections, the matter of scheduling new generation, the matter of staggering generation and being able to construct larger generations so they can share it.

It includes a consideration of reserves and the allocation of reserves among the companies. It includes the opportunity to reduce the overall reserve capability and economies and it also includes the opportunity for economic exchanges, so that we have here an opportunity for a very broad gage improvement in both the reliability and economy of all of these four systems.

MR. KORNEGAY. I believe you do have under consideration a further integration or enlarging that pool, other than a power generating company, with some who are not selling power to the public, so to speak.

MR. WHITE. Yes, in the sense that this underlies both our analysis of the past power failures and the legislation which we have pending before the committee that Chairman Macdonald introduced.

MR. KORNEGAY. That is all, Mr. Chairman.

MR. MACDONALD. Mr. Broyhill.

MR. BROYHILL. Thank you, Mr. Chairman. As the gentleman and I come from the same area in question, I would like to clear up one or two points here.

You say that in the *Florida* case, the Florida Public Service Commission, the main thing is the same system of accounts and that other States are adopting the same system of accounts that the FPC requires?

MR. WHITE. I is my understanding, congressman, that the Florida Public Service commission virtually tracks or has identical provisions although on some of the particular items these are comparatively recent actions by the Florida commission.

If it would be helpful for the record we would be delighted to submit a detailed summary of any advantages and differences.

MR. BROYHILL. I don't think that I would want that for the record, but I want to go on and say and ask if the other States are adopting the system of accounts that the FPC requires.

MR. WHITE. The answer is "Yes". I can't claim that it is 100 percent because we have some States that don't even have regulatory commissions. There are three States in the contiguous 48 that simply do not have any agencies set up for these purposes so obviously in that case it is not so.

Mr. Solomon points out that in our relationships with the States it would be better if I recast my answer to indicate that what we are talking about is not something that we have imposed or sort of pressed down on the States and that they are acquiescing and going along with it because they have no alternative.

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Rather, as I tried to indicate in my formal statement and earlier, we have worked these out jointly. We have groups that meet from the State commissions and the State commissions are formed into a national association to try to develop accounting practices that are mutually beneficial.

MR. BROYHILL. What I am getting at is that under the practice today the utilities are not required to keep two or three sets of books?

MR. WHITE. That is correct and that is the purpose of this joint consultation: to establish principles that meet their needs and the Federal needs and will ease the burden on the company. We believe that if we can send our auditor together with the State auditor to the same company at the same time that it is more economical use, more efficient use, of everybody's resources, including the company's.

MR. BROYHILL. Does the Internal Revenue Service follow your system, or their own system, or what?

MR. WHITE. In terms of working with States?

MR. BORYHILL. In terms of finding out what is the net profit or gross profit before taxes.

MR. WHITE. I am not sure I quite follow the question. You mean in terms of the utilities themselves?

MR. BROYHILL. Yes.

MR. WHITE. I don't know the answer to that, to tell you the truth, I will have to check into it and find out. Our chief accountant advises, Congressman, the answer is "No; they do not."

MR. BROYHILL. Then if you come up with a figure of a total capital account the State of Florida would have that same figure as its basis for setting of rates.

MR. WHITE. To the extent that there is agreement on principles in which basic forms of rate regulation, rate setting, shall be followed, the answer would be "Yes." There could be the case in which a State would take a different view of a particular item than does the Federal Power Commission.

Our effort is to try to direct and focus attention on those areas where there are differences and which are very small and minor in terms of numbers, anyhow—they may have significance beyond the number, but for the great bulk of the accounting practices and determination to be made in accordance with a single system that we adhere to and respect and that the States accept and use for their purposes.

So it is possible we could find the Federal Power Commission reaching a different total capital cost for a utility

than would a State. We would, nevertheless, have joint audits. We would still be able to use the great bulk of those areas where our determinations are equal or equivalent.

MR. BROYHILL. If you ultimately exercise jurisdiction over the Florida Power & Light Co. this means that you will be coming in and actually telling the company how much it can charge for power or how much its rate base is?

MR. WHITE. If there were a challenge either on the initiative of a customer, on the State commission, or the FPC claiming that its wholesale rates were too high or that they were discriminatory and the FPC decided that this was a legitimate complaint that ought to be explored we could indeed find ourselves doing that just as we can for any other utility in this country that is subject to our jurisdiction.

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MR. BROYHILL. You could challenge the rate on wholesale rates, but not on retail?

MR. WHITE. That is correct, and under the existing situation even the Florida Public Service Commission does not have authority over the wholesale rates charged in the State of Florida.

MR. BROYHILL. If the company does not sell any wholesale to anyone what purpose does the FPC jurisdiction serve?

MR. WHITE. If they are not selling it wholesale?

MR. BROYHILL. Yes.

MR. WHITE. Certainly with respect to rates there would be no advantage whatsoever. With respect to accounting practices, I would think there would be some benefit. It might be minimal, and if it were the case that there were no actual wholesale sales between a utility and other utilities we would have no rate problems.

There is, however, a third art of our jurisdiction that I referred to in the formal statement that had to do with the interconnections reliability of service. This is our section 202(b) of the existing Federal Power Act.

MR. BROYHILL. This is voluntary, is it not?

MR. WHITE. No, sir.

MR. BROYHILL. It is not?

MR. WHITE. No, sir. Under that, for example, we can give you an illustration. A utility in Georgia, municipally owned, claimed that it was not being adequately served by the major utilities in the area. It came to the Federal Power commission and lodged a complaint, said that its people were not being served, that they had a whole series of power failures, and "under this particular section we are seeking relief" that would not be available to a Florida municipality if I understand your question.

MR. MACDONALD. Mr. Van Deerlin?

MR. VAN DEERLIN. Thank you, Mr. Chairman. Mr. White, could you give us an estimate of the volume of power companies, not by number of companies, but I suppose by units of service provided, that would be affected by this legislation? I suppose it turns on legal interpretation of what is intrastate, but how big a slice are we talking about?

MR. WHITE. You are right, we would have to qualify any answer because first of all there is always a problem of interpreting language and some of this is kind of new and would involve both the decision within the Commission and then ultimately by the courts, by the courts, but sliding over that and the second qualifier which I think ought to be in the record, and that is you are talking I think the way things are operated today rather than were this enacted, and this is one of our fears, that there would be some companies who would undertake to adjust their operations. They may not believe it is advantageous, but they would make the decision Congressman Kornegay was talking about, that it may be worth escaping our jurisdiction if they adjust their operations.

I would think not and hope not, but to the extent that that is there we can't give you a figure. However, with those two qualifications I would say we are still talking about a pretty

small slice and maybe it is two dozen utilities in the country. It certainly wouldn't be any more than that, would be my guess.

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We have not made a detailed study. It has been impossible to for reasons I have suggested. We are not talking about a large number of utilities. We are I think perhaps, however, talking about some that are quite major in the fact that they are large utilities and serve a large number of people.

MR. VAN DEERLIN. In the matter of establishing reserve margin standards, something which often imposes extra costs on a power company, what progress has been made in this direction, and establishing greater reliability, in the roughly 2 years that have elapsed since the northwest power blackout?

MR. WHITE. This is certainly one of the elements that we focused on in our preparation of our reports that came to the Congress. We have regional advisory committees established by the FPC made up of all segments of the industry in six regions of the country and we have undertaken through Mr. Brown, the head of our staff, and through our own relationships with the utility executives that serve on these committees to get them to focus on reserve factors and primarily, as your question suggested, for the purposes of reliability.

It is perfectly evident, and was in the summer of 1966 that we had one area of the country where there was just inadequate capacity. There were explanations for it. This was the St. Louis area. You may remember that persuasive heatwave that lasted for a couple of weeks and hit the whole eastern two-thirds of the country. There just was not enough power to meet all of the daily needs of the people in St. Louis and on the rotating basis the companies serving that area simply dropped loads, what we characterize as a brownout.

We had one very minor one her in the Washington area this past summer where we were operating on slightly reduced voltage in order to make sure that all the powerloads were met.

I would say we are making some progress, to answer your question, directly, and I wouldn't want to suggest that it is again our wisdom. It is the management themselves that are focusing on this. There is no utility management that wants to go through a blackout or a brownout. They grew up with service as their watchword and now they do an excellent job by and large.

MR. VAN DEERLING. Would these exemptions for the dozen, or possibly 2 dozen companies exempted by this legislation, put a crimp in this kind of planning and activity by—

MR. WHITE. It is very tempting to just give you a yes, but in fairness I must qualify it.

It would indeed under the existing legislation. If, however, the Congress acts on our electric reliability act I think the answer is it would not really have quite as much significance and may shrink down to an inconsequential area because in that proposal it is aimed at bulk power supply and does not have built within it any exemption.

That includes even the Federal operators.

MR. VAN DEERLIN. Thank you, Mr. Chairman.

MR. MACDONALD. Mr. Brown?

MR. BROWN of Ohio. Mr. White, in your statement, I would like to pursue just a couple of points and ask one question about this man.

On page 5 you suggest that this legislation would have the effect of discouraging interconnection and I presume the point that you are making is that this would reduce reliability of the individual utility, but I would put the question in another reference.

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Wouldn't the discouragement of interconnection encourage the utility to have adequate power sources to meet its peak or emergency load need and, in effect, increase the reliability of that individual utility?

MR. WHITE. I understand the question completely and I must say I think that virtually all of the engineering systems and

analyses in the country, not by the Federal Power Commission but by utility managements, regardless of their form of ownership, indicate exactly to the contrary.

There is no question but what it would be possible for a system to virtually isolate its system to have adequate reserve, but in order to have that adequate reserve it has to make such a large capital investment in facilities in order to have the standby that it penalizes its own consumers by charging, legitimately charging, them more for their electric service than would otherwise be possible.

If you have one utility that is meeting its own needs it has to have another adequate reserve available instantaneously to meet any situation that can be predicted will occur within its system.

If, however, you are able to link that system A with system B then their total reserve of needs are not as great as if they were operating alone because they can move power back and forth when one has an emergency, and you don't assume that they are going to have emergencies simultaneously, so that this is the whole underlying concept for interconnection.

It is not only more reliable, but obviously cheaper. If you don't have to invest in the facilities that you will not use very often but you need them for standby or reserve purposes it makes a far better investment for the company to build transmission lines where it can move that back and forth and enter into agreements so that mutually they protect one another, so that is the answer, I believe, to your question.

MR. BROWN of Ohio. And if the assumption that both systems would not have peak demands at the same time is not correct, then when they are interconnected they are both out; is that right?

MR. WHITE. I am sorry, I think I lost you there.

MR. BROWN of Ohio. If the assumption that they will not both have peak demands or emergency demands at the same time is in error, and they should both have peak or emergency demands at the same time, then both systems are in trouble; is that right?

MR. WHITE. It depends entirely upon how well designed their reserve situation is. They will indeed be able to provide for single contingencies or even double contingencies. It is conceivable—and don't forget, now, when I am talking about these two, that is for purposes of simplification. The way it actually is working is that this is two within a group of perhaps 30 or 40.

MR. BROWN of Ohio. Like the Northeast?

MR. WHITE. Like the Northeast or, more important, like the Ohio area. Ohio now is the east-central area. We have something like 25 utilities in that region, including Michigan, Indiana, Ohio, western Pennsylvania, West Virginia, part, I think, of the tip of Maryland, and Kentucky.

Twenty-five utilities have gotten together in the reliability undertaking, so that Ohio Edison knows that if they are going to go down

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they have a call on the reserve capacity of organizations that are with that, some as far away as 300 or 400 miles, and our lesson from Northeast power failure is that interconnections are bad, but that they are to be undertaken they must be strong and effective.

As we sit here today we are seeing lights operating continuously. For all we know Pepco has lost a large generator because it is tied to the PJM system. However, it has the reserve capacity of a number of systems, 11 or 12 other systems, to call upon to meet its immediate needs so that I think really it does work.

I suggest that there was testimony yesterday to indicate the contrary. So far as I know that is the first time any major utility has indicated that interconnections are somehow or other not good and ought to be discouraged. If that is the issue, then I think that these hearings are serving a highly worthwhile purpose to have attention focused on that.

MR. BROWN of Ohio. Obviously I am questioning in that area because it seems to me that it depends on how much surplus power generation capacity you have in an interconnection just as it depends on how much surplus power generation you have in an individual utility as to whether or not you can meet the emergencies that may arise, and when you tie a lot of utilities together which don't have adequate surplus power generation individually you have a lot of utilities which go down together rather than just one, and the individual utility which can meet its own needs may be able to survive in the middle of that. I rather imagine we will come to that subject in more detail at a later time, so I won't pursue it with you.

Let me move on to just pick up another point. If you can answer me very briefly on this I would appreciate it, but I did hear all the comments that were made with reference to the same line of questioning by me colleagues.

What, in addition to auditing and accounting procedures, are the added burdens of regulation by the Federal Power Commission that would make a company prefer not to be regulated by the Federal Power Commission?

MR. WHITE. That is obviously a question that perhaps someone who has different views than I could answer more forcefully, but I will do my best.

MR. BROWN of Ohio. In your testimony you suggest that there are a lot of advantages that everybody agrees to and I would imagine if somebody does not want to be regulated he may not agree to all or some of these advantages you cite.

MR. WHITE. Surely, right. I will tick them off as quickly as I can. The first is just the natural instinct not to have another group of people looking over your shoulders.

MR. BROWN of Ohio. Regulation per se.

MR. WHITE. Yes.

MR. BROWN. Of Ohio. By an additional body.

MR. WHITE. Yes. You know, you have your own situation and this introduces an unknown situation and it is perfectly rational and reasonable for somebody to resist that.

The second is that on the question of rates under the situation, for example, in Florida today there is no State agency with authority to control wholesale rates. If this Federal Power Commission has juris

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diction over a particular company in Florida, as the majority of the FPC believes that it does, we will then also have the authority not only to require a accounts, but to regulate the rates that are unreasonable or that are discriminatory.

MR. BROWN of Ohio. This deals with the competitive factors to which you made reference in your testimony.

MR. WHITE. Yes.

MR. BROWN of Ohio. The factors of possible competition.

MR. WHITE. Yes.

MR. BROWN of Ohio. I want to come back to that.

MR. WHITE. Or unreasonable rates just because they are set too high or because utility. A sells to community C at one price and community D at another price and this is discriminatory. If that is the case then there is a forum where municipal C and D can come and say, "We are being discriminated against," or "Our rates are too high."

MR. BROWN of Ohio. This is not now in existence?

MR. WHITE. This is not now in existence in the State of Florida, correct.

MR. BROWN of Ohio. Are there other factors? That is two more in addition to auditing and accounting.

MR. WHITE. Yes, there is. The third one relates to this question of interconnection or compulsory linkage between two systems. Under our existing legislation, the ones that we operate under today, we have the authority wherever a public utility is jurisdictional or subject to our jurisdiction to receive complaints either from a State commission or from a utility system that says, "We are in a desperate situation and we want utility A to provide us some power, some emergency power."

MR. BROWN of Ohio. I understand that. Now, are there any others?

MR. WHITE. I don't think so. Are there any other points? They are not nearly as important to tick off as the basic ones, but also where a public utility is subject to our jurisdiction if it undertakes to acquire or merge with an additional system that must come to the FPC for approval.

MR. BROWN of Ohio. And this could in certain States be resolved by the State public utility commission, is that correct?

MR. WHITE. That is correct. An additional one is the issuance of securities by jurisdictional public utilities. If the States do not regulate that, then the Federal Power Commission under the existing Federal Power Act does regulate or have surveillance over the issuance of securities.

MR. BROWN of Ohio. But if the State does regulate it then you do not have that regulatory power.

MR. WHITE. Correct, under existing legislation, correct.

MR. BROWN of Ohio. On page 15 you make some reference to the idea that customers who purchase power for resale are often competitors (actual or potential, in the area where the two systems are contiguous) for commercial and industrial customers.

How are these competitive differences now resolved in a situation which is under your jurisdiction? Are they resolved at the State level, or the Federal level, or are they not resolved by any formal organization but rather just simply by the marketplace competition?

MR. WHITE. Under the existing authority of the Federal Power Commission if a utility contiguous to another believes and is a purchaser of power to meet its own customer needs and comes in and

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claims to the Federal Power Commission, which it can do—we do have authority—that its supplier has imposed upon it restrictive provision saying, for example that it will in the

contract to supply power from A to B, that that obligation will go only so long as B does not sell to a third party at a certain volume, a competitive situation, we have had before us such a situation at the Federal Power Commission and have found that that was a restrictive provision that was contrary to public interest and have indicated we did not believe it should stand.

MR. BROWN of Ohio. Well, the reason I ask this question—I don't want to pursue it further or try to press the Chairman too far— might this not be a sixth factor in the question of whether a utility might not want to come under FPC regulation?

MR. WHITE. I thought I put that in when I spoke about rates. When we say rates we mean not only the level, but whether they are discriminatory or restrictive, so it would be a sub point of that.

MR. BROWN of Ohio. The question that I am trying to get an answer to is whether this situation is not covered in most States by State regulation? In other words, are the companies of the Federal decision in this matter where they might be more confident of the State decision in such a matter, or are the States not speaking to this problem at all?

MR. WHITE. We do have that authority where we have jurisdiction over a utility. In the States where there is no authority to regulate wholesale sales there is no place to go. There are a few such States.

Where, however, the State commissions do have authority they too can regulate them. There is a dual jurisdiction, so that there are two different forums available to the aggrieved utility who believes it is being treated harshly, unfairly, or at a great disadvantage to its customers where it might elect to go.

MR. BROWN of Ohio. Thank you.

MR. MACDONALD. Thank you, Mr. Brown. Thank you very much, Mr. Chairman, for coming here with your group. We certainly learned a good deal and it is a pleasure to once again see you up here.

MR. WHITE. We thank you, Mr. Chairman, and this has been an excellent opportunity for us to talk about some of the matters that we believe are so important.

Thank you.

MR. MACDONALD. Thank you. The next witness is Mr. H.L. Baker of the Savannah, Ga. Electric Power Co.

MR. BROWN of Ohio. Mr. Chairman, there is one point I want to make about the map before it comes down. I want to ask a question about this map because of some knowledge I have of the situation in Ohio.

Does this map only cover peak power capacity failures, or does it include technical failures, and acts of God and man and nature?

MR. WHITE. What it covers primarily, Congressman, are what we have characterized at the Federal Power Commission in our report to the Congress and the President as major power failures and those that are cascading.

MR. BROWN of Ohio. You have cities on there designated and I notice your have one in Cincinnati. I presume you indicate that is a power failure. I may be wrong.

MR. WHITE. That was not a cascading power failure, just as the one in St. Louis was not. Those are ones that were major power failures

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in the sense that a large number of people were inconvenienced for a long period of time.

MR. BROWN of Ohio. The one in Cincinnati was a result of a labor dispute, was it not, or presumed to be?

MR. WHITE. There is some controversy about it. It was a case in which there was some unexplained damage to facilities and equipment.

MR. BROWN of Ohio. It was not a peak load or cascading failure.

MR. WHITE. No, sir.

MR. BROWN of Ohio. And these then include many other things besides peak load and cascading failures.

MR. WHITE. Primarily the peak load is a slightly off-beat expression for us. What we are really talking about here for the most part—underneath that overlay there is another overlay that shows the 19 major power failures that I was talking about that relate to the cascading type of failure.

MR. MACDONALD. May I interrupt, Mr. Chairman? I think this is a subject that the bill that you referred to filed by myself and Mr. Staggers would go to and doesn't really affect this particular issue and therefore I would rather not dwell on it.

MR. WHITE. All right. We do have, however, a little description of it and if it would be helpful I would send it to you, Congressman.

MR. BROWN of Ohio. All right. Thank You.

MR. MACDONALD. My last question, Mr. Chairman—and everyone has a last question—Does the FPC jurisdiction of wholesale rates come from the *Colton* decisions, so called?

MR. WHITE. It was really a decision by the Congress to vest the Power Commission with the authority and it is, I think, unambiguous and uncontroverted, so that is where it came from.

MR. MACDONALD. Thank you very much.

MR. WHITE. Yes, sir.

(The following letter was received by the committee:)

FEDERAL POWER COMMISSION
WASHINGTON, D.C., NOVEMBER 15, 1967

HON. TORBERT H. MACDONALD,
Chairman, Subcommittee on Communications and Power, House of Representatives, Committee on Interstate and Foreign Commerce, Rayburn Office Building, Washington, D.C.

DEAR CHAIRMAN MACDONALD; Thank you for your letter of November 3, 1967, asking that I develop further, for purposes of the record of the hearing on H.R. 5348, the matters

raised by your closing question concerning the Commission's jurisdiction over wholesale sales of energy by a public utility within a State to municipalities and cooperatives for distribution and resale by them. You also request that I go into the effect of the Colton case on the Commissioner's jurisdiction. I appreciate the opportunity to do so.

The Commission's jurisdiction over wholesale sales under Part II of the Federal Power Act is tied to not one but two tests, both of which must be satisfied if there is to be jurisdiction. First, the company selling at wholesale must be a "public utility" within the meaning of the Act. This statutory status now arises whenever the company engages either in transmission of electric energy in interstate commerce or in the sale of electric energy in interstate commerce for resale. H.R. 5348 proposes to change the jurisdictional tests bearing upon "public utility" status and would, as a result, exempt some companies which are now "public utilities". If a company is not a "public utility" within the meaning of the Act then none of its wholesales are subject to the regulatory provisions of Part II, and the second test is never applied. In the case of a "public utility" the Commission has jurisdiction over those wholesales which are made in interstate commerce, including sales to municipal and cooperative distribution systems for resale by them.

APPENDIX I

H. Rep., Hearings Before the Subcommittee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935) Frank R. McNinch, Chairman, Federal Power Commission, introducing Testimony of FPC Commissioner Clyde L. Seavey and excerpts from Seavey Testimony

I-1

Public Utility Holding Companies

HEARINGS

BEFORE

THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

SEVENTY-FOURTH CONGRESS

FIRST SESSION

ON

H. R. 5423
TO PROVIDE FOR CONTROL IN THE PUBLIC INTEREST OF PUBLIC UTILITY HOLDING COMPANIES USING THE MAILS AND THE FACILITIES OF INTERSTATE COMMERCE, TO REGULATE THE TRANSMISSION AND SALE OF ELECTRIC ENERGY AND NATURAL GAS IN INTERSTATE AND FOREIGN COMMERCE, AND FOR OTHER PURPOSES

PART 1
FEBRUARY 19, 21, 22, 26, 28, MARCH 1, 5, 6, 7, 8, 9, 12, 13, 1935

Printed for the use of the
Committee on Interstate and Foreign Commerce

PUBLIC UTILITY HOLDING COMPANIES

THURSDAY, MARCH 7, 1935

House of Representatives,
Committee on Interstate and Foreign Commerce,
Washington, D.C.

(383) The committee met, pursuant to adjournment, at 10 a.m., Hon. William Rayburn (chairman) presiding.

STATEMENT OF COMMISSIONER FRANK R. MCNINCH, CHAIRMAN FEDERAL POWER COMMISSION

The CHAIRMAN. All right, Mr. McNinch. I think that the hearing today is specifically on title II of the bill. The representatives of the Power Commission are here.

Commissioner MCNINCH. Mr. Chairman and gentlemen of the Committee, the Federal Power Commission does feel a special degree of interest in title II of the bill under consideration because it so directly affects the functions and the jurisdiction of the Commission.

The amendments to the Federal Water Power Act begin on page 77 of the bill and the first part or title of these amendments has to do with the textual amendment for the purpose, primarily, of the clarification of the act as we now have it.

These amendments are suggested out of the experience of the Commission in its administration of the Federal Water Power Act and because of the character of these amendments, being as I have said, primarily for the purpose of clarifying the act at various places, it is thought that you may not want any extended discussion of those particular amendments; but we shall be very glad at any later time if the committee has difficulty about any one or more of those amendments to give you our views of the reasons for the necessity for such amendments.

The second part of title II, beginning at page 103, carries new matter intended to enlarge and extend the jurisdiction of the

Commission, directed primarily toward the coordination of the power generated and transmission facilities in the United States, intended as we believe, effectively, to serve the interests of the consumer in bringing to the consumers electricity upon more economical terms and at less cost than under the present lack of coordinating arrangements and likewise being equally to the interest of the companies.

This is the title that we believe there is need for some discussion on the part of the Commission in order that the committee may understand the underlying reasons or philosophy of the coordination that the Commission is suggesting.

Through this title II of title II in the bill, and because Commissioner Seavey has had such a wide and varied experience as an administrator,

* * * * *

(402) As I have indicated, it is the purpose of this bill that the Power Commission will assume only jurisdiction over the interstate wholesale business of these companies. I think I have already made that plain.

Mr. BULWINKLE. Right here, Mr. Commissioner, is where I'd like to ask you a question. You say it is the purpose of the Power Commission to only assume control over the wholesale distribution of power.

Commissioner SEAVEY. Yes.

Mr. BULWINKLE. By the Power Commission: is that correct?

Commissioner SEAVEY. Yes.

Mr. BULWINKLE. Well then taking into consideration all the provisions of this title, do you not go further than that?

Commissioner SEAVEY. With the amendments that I have indicated should be made. I do not think so.

Mr. BULWINKLE. Let us just take this proposition under section 204, providing for additions to any operating plant, noting that if that additional part, that power used, generated, from the addition were not to be used in interstate commerce,

that power plant would have to come to the Commission to ask for its approval, would you?

Commissioner SEAVEY. If it did interstate business; yes.

Mr. BULWINKLE. If it did the least interstate business?

Commissioner SEAVEY. Sir?

Mr. BULWINKLE. If it did the least interstate business it would have to come to the Commission?

Commissioner SEAVEY. Oh, yes; there is no distinction in the amount or percentage of business, interstate, that is done the utility which would bring it under the regulation of the Federal Commission.

Mr. BULWINKLE. And, you go even further than that; if the company had to give a mortgage or had any consolidations, irresponsible of what they were, under section 205, you would have control then, would you not?

Commissioner SEAVEY. Yes; those are essential provisions of proper regulation.

Mr. BULWINKLE. So the only thing that you way that you would do under this title is to provide that the States shall regulate their state charges, and the local distribution, if the company is not engaged in interstate business.

Commissioner SEAVEY. Yes; and the local services, and all the regulations regarding intrastate services and rates, and findings.

Mr. BULWINKLE. So, after we come down to it, there is very — left for any State commission, if this bill were enacted into law.

Commissioner SEAVEY. Everything is left to the State commission that they are performing now. There may be some overlapping jurisdiction as I have explained, but the States now have no jurisdiction over interstate transmission.

Mr. BULWINKLE. No; but they have over its distribution.

Commissioner SEAVEY. Yes; and under this bill, this Commission would have no jurisdiction over distribution.

Mr. BULWINKLE. I do not know whether all of the States have not; but they have control over the additions to any operating companies.

Commissioner SEAVEY. Oh, yes, sir.

(403) Mr. BULWINKLE. At the present time; but they would not under ---

Commissioner SEAVEY. Oh, yes; they would.

Mr. BULWINKLE. They would then, jointly with you.

Commissioner SEAVEY. Yes; but they would have their separate jurisdictions.

Mr. BULWINKLE. But, it could not be separate, when it is joint, would it?

Commissioner SEAVEY. Well but, the two jurisdictions will be —ted. Now, it may be that one jurisdiction might impose heavier requirements upon the utilities than the other. Those are maximum requirements.

Mr. BULWINKLE. Which commission, the State utilities commission, or the Federal Commission, would outvote the other in the joint-standard proposition?

Commissioner SEAVEY. I would say this: If a State commission proposed additional requirements for intrastate purposes upon the —ity that that would be effective. It would be beyond what the Federal Commission might impose, but they would both be effective.

Mr. BULWINKLE. But, if they did not go as far as your Commission could, then it would not be effective; your Commission would con— ?

Commissioner SEAVEY. Control so far as the maximum requirements are concerned, the same as a State commission would control as far as their maximum requirements are concerned.

Mr. BULWINKLE. I want to know for my own information—I am not trying to argue with you—but, just for my own information.

Commissioner SEAVEY. Yes.

Mr. BULWINKLE. Then, the whole title II of this title II is the regulation in the Federal Power Commission of additional power and authority, giving them the right, so far as any corporation engaged in interstate commerce is concerned for the transmission of power, no matter how little, the right to have a control over that corporation.

Commissioner SEAVEY. Yes.

Mr. BULWINKLE. That is correct?

Commissioner SEAVEY. Yes; if you are going to regulate, you must have the control.

Mr. BULWINKLE. Now, your section 209, let me just call your attention to that. Do you not think that that is a very broad section?

Commission SEAVEY. Yes, it has to be broad. You cannot regulate without the power to regulate.

Mr. BULWINKLE. There is no amendment that you will have to refer to that section?

Commissioner SEAVEY. I do not down of any to that section. That refers to the interstate practices and rules and regulations.

Mr. BULWINKLE. Will you describe to me your idea of how one of those joint boards would work?

Commissioner SEAVEY. How the joint board would work?

Mr. BULWINKLE. Yes.

Commissioner SEAVEY. I can only illustrate that by the way joint boards now work between the Interstate Commerce Commission and the State Commission of California. It is true that there has been a good deal of—

Mr. BULWINKLE (interposing). Just let me ask you right there, does the State of California Railroad or Utilities Commission nominate a (404) joint board member to work with the Interstate Commerce Commission?

Commissioner SEAVEY. Yes, sir; it appoints someone to sit with the Interstate Commerce Commission.

Mr. BULWINKLE. Someone of its own commission?

Commissioner SEAVEY. Yes: or an examiner.

Mr. BULWINKLE. But, there is no requirement in the Federal law.

Commissioner SEAVEY. Yes; there is a permission in it.

Mr. BULWINKLE. It is a permission, but not a requirement that they shall have joint boards.

Commissioner SEAVEY. There is no requirement here. It is very doubtful if you can make the requirement, where the Federal jurisdiction is concerned.

Mr. BULWINKLE. But the wording of this section is that the board shall be appointed by the Commission.

Commissioner SEAVEY. Yes.

Mr. BULWINKLE. From persons nominated by the State commission of each State.

Commissioner SEAVEY. Yes; that is positive, that the joint board would be nominated by the State commission or by the Governor, if there is no State commission.

Mr. BULWINKLE. Under the Interstate Commerce Act, your utilities or railroad commission designates one to sit with the Interstate Commerce Commission.

Commissioner SEAVEY. That is true. This goes further than that.

Mr. BULWINKLE. This goes further than that; and the Federal Government does not pay the expenses of your utility commissioner for sitting with it.

Commissioner SEAVEY. That is true.

Mr. BULWINKLE. And yet under this it does pay his per diem.

Commissioner SEAVEY. Yes: it may pay it.

Mr. BULWINKLE. So he is a Federal officer in fact, nominated by the State.

Commissioner SEAVEY. Yes.

Mr. BULWINKLE. The commission, or the Governor.

Commissioner SEAVEY. That is true. We are trying to get regulation as close to the place where it should be regulated as possible, and that is the purpose of this bill, not to take away from the States even in interstate business, a contact with the

control of the rates that must be imposed through the Federal jurisdiction.

Mr. BULWINKLE. But, while you may intend that, yet the act provides for everything that an operating company can do, says that they shall have to—engaged in interstate commerce is what I am speaking of—shall have to come to your Commission here in Washington.

Commissioner SEAVEY. Oh, yes, sir; it must come finally, if there is any conflicts, to the authority that exists.

Mr. BULWINKLE. Again, when it comes to any complaint that may be placed upon it by an operating company, before they can do that, they will have to come to the Commission in Washington, will they not?

Commissioner SEAVEY. They will have to make application, yes.

Mr. BULWINKLE. Yes.

(405) Commissioner SEAVEY. Or it might be by complaint by the States.

Mr. BULWINKLE. You are not then coming down to your local position at all.

Commissioner SEAVEY. You are getting back, you are getting federal jurisdiction back so that it will be applied as closely as possible to the locality in which it will be exerted.

Mr. BULWINKLE. Now, you are a commissioner and this question comes up to you under section 207 of legitimate prudent costs.

Commissioner SEAVEY. Might I interpose here, before we leave the other matter, that the provisions in this bill regarding joint board and cooperation are patterned after the communications bill, which this committee reported out and Congress adopted regarding the same matter. That is section 410(a).

Mr. BULWINKLE. Will you read that section?

Commissioner SEAVEY. Section 410(a), page 38 of the published — reads:

The Commission may refer any matter arising in the administration of this Act to a joint board to be composed of a member, or of an equal number of members determined by the Commission, from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed, and any board shall be vested with the same powers and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold a hearing as hereinbefore authorized.

Mr. BULWINKLE. Who nominates that man in the "joint board," as you call it, in the Communications Commission?

Commissioner SEAVEY. The Federal commission.

Mr. BULWINKLE. All right.

Commissioner SEAVEY. Selects him.

Mr. BULWINKLE. All right.

Commissioner SEAVEY. But, in this other act, as I stated in my explanation, we go further.

Mr. BULWINKLE. That is what I am calling your attention to, that — go further than anything we have had yet in legislation.

Commission SEAVEY. Yes: it goes further in the matter of coordinating the States and the Federal authority in complete regulation. There is not any question about that, but that this bill, as I stated, goes much further than the Communications Act, in trying to get back as far as possible to the source of the questions that may arise.

Mr. BULWINKLE. Now, let me ask you this question—

Commissioner SEAVEY: I have not completed this section.

Mr. BULWINKLE: All right, will you complete it?

Commissioner SEAVEY (reading):

The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State or by the Governor if there is no State commission, and appointed by the Federal Communications Commission.

Now, our act is broader than that.

The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

Now, this act provides that when this joint board is selected, it may select a member or members to represent them and sit. There might

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PUBLIC UTILITY HOLDING COMPANIES

FRIDAY, MARCH 8, 1935

House of Representatives,
Committee on Interstate And Foreign Commerce
Washington, D.C.

(419) The committee met pursuant to adjournment, at 10 a.m., Hon. Rayburn (chairman) presiding.

STATEMENT OF COMMISSIONER CLYDE L. SEAVEY, OR THE FEDERAL POWER COMMISSION

The CHAIRMAN. The committee will come to order. You may proceed, Mr. Seavey.

Commissioner SEAVEY. Mr. Chairman and gentlemen of the committee, I started out yesterday to try and complete my general statement, and we got into a general discussion of questions. May I proceed this morning with my general statement?

The CHAIRMAN. You may try. I think that the committee members, though, are very much interested specifically in the amendments we have to the Water Power Act. You may go ahead as far as you can.

Commissioner SEAVEY. I thought that I would endeavor to give you the general picture.

Mr. PETTENGILL. May I ask how long it would take to make your general statement, if you are uninterrupted?

Commissioner SEAVEY. Well, I presume it would take an hour, very nearly; three-quarters of an hour anyway.

Mr. BULWINKLE. I am in favor, Mr. Chairman, of letting him go ahead and complete his statement and then if we wish to we can interrogate him.

The CHAIRMAN. You may proceed.

Commissioner SEAVEY. Will the questions be limited to the same — that I take in making my statement?

Mr. PETTENGILL. There can be no assurance of that.

Mr. MAPES. A general statement without discussion of these specific amendments does not help me very much. I do not know whether it does the rest of the committee or not, but I am anxious to know what the proposed amendments are, what the effect of them is going to be.

The CHAIRMAN. Proceed.

Commissioner SEAVEY. I will try to bring that out in a general way, and then the matter of discussion of these specific provisions I thought would follow.

Mr. MAPES. In other words, the members of the committee may have some idea as to what the effect is going to be of a particular (420) amendment, and its wording and so on, and of course want to retain their right to make their own comments about that, if that —mitted.

Commissioner SEAVEY. I would say that I have personally no objection to the interjection of questions. The only objection I might have would be that I have some notes, and I do not want to stale on them before I get to the end of them.

The CHAIRMAN. Well, you may proceed.

Commissioner SEAVEY. In passing the Communications Act, I have been informed that there was under consideration the extent of the interstate calls, for instance, in telephones. At that

time on the passage of that act, that percentage was about 5 percent of the total calls.

Now, in the electrical energy field, at the present time, the movement of interstate transmission is over 17 percent. That, however, in percentage does not in either case indicate the full measurement of the need of regulation. A larger or a smaller percentage does not spell very much and that is not advanced at this time by the commission as urging that regulation is more necessary because of the larger percentage than it was in the smaller percentage, but it is interesting to note, I think, that there is a very substantial movement of interstate energy at the present time.

Mr. BULWINKLE. How much?

Commissioner SEAVEY. There is over 17 percent of the total produced moved in interstate commerce.

Of course, some of that movement may affect a very few people but the effect on those few people is just as vital to them as it was upon a much larger group of people, and so the whole field of regulation of the interstate movement is covered in this bill irrespective of the percentage that may move.

As a matter of general knowledge, however, most of this movement of interstate energy is among large groups, and to large groups. As shown by Mr. Ready in his presentation, there is now at the present time more energy moving interstate than was generated in the country in 1913.

There has been a tremendous increase not only in the total of energy generated and produced and moved in the country; but there has been a tremendous increase in the amount of interstate energy and as that increases, the problems that go with it increase so far as regulation in the States is concerned.

Mr. PETTENGILL. Well, that means then that the energy produced in 1913 was not more than 17 percent of the total energy now produced?

Commissioner SEAVEY. Yes.

Mr. PETTENGILL. In other words, in 20 years the business has multiplied nearly 500 percent.

Commissioner SEAVEY. Yes, sir.

Mr. PETTENGILL. Is there any other industry in America, outside of automobiling and petroleum, perhaps, that has moved as far as that?

Commissioner SEAVEY. I do not know, unless it is the gas industry, and I do not know that that is true with the gas. I have no figures on any other industry, but it would seem that probably there was no other industry that would show the same percentage, because of the development of the electric industry has been more tremendous, I think, in that period than either gas or other industries.

(421) Mr. PETTENGILL. Have you any idea, sir—of course it is purely a guess—as to what the industry will do in the next 20 years?

Commissioner SEAVEY. No; I am not a prophet; but I think if we look at how it has developed in the past and the potentialities of the development of its use, that there will be a tremendous increase in the development and the use of electric energy in the future. Whether that will be as much as it has been in the past formative years of the development of the energy, I would not want to prognosticate.

Mr. PETTENGILL. Well, it is nowhere near the saturation point, is it?

Commissioner SEAVEY. No.

Mr. PETTENGILL. Have you got any figures to show the percentage of individual electric energy users to the total number of people living in the areas served by these great utilities?

Commissioner SEAVEY. I do not know that I exactly understand your question.

Mr. PETTENGILL. Of course, the percentage would be much less in the rural districts, could it not?

Commissioner SEAVEY. Oh; you mean as between—

Mr. PETTENGILL. Take the number of homes in America; what percentage of them have electricity at the present time?

Commissioner SEAVEY. I could not tell you the percentage. I think I can get those figures for you.

Mr. PETTENGILL. I wish you would. Go ahead.

Commissioner SEAVEY. Now, the movement as I indicated of this interstate energy is very vital so far as the regulation of the rates and the services is concerned, especially to the States.

The United States Supreme Court has held, as I understand it, and have been informed, that a State has no control over the wholesale price of energy moved interstate.

Mr. BULWINKLE. Just right there. What percentage of this 17 percent is wholesale and what retail?

Commissioner SEAVEY. Well, I think that practically all of it is wholesale in nature. There is some that, and maybe a considerable quantity, you might call as interstate distribution; but the most of it would say was wholesale, exchange over the State lines.

Mr. PETTENGILL. Well, do the State commissions even in intrastate fix wholesale rates for that which is exchanged between one company and another?

Commission SEAVEY. Between one State and another?

Mr. PETTENGILL. No; between one company and another.

Commissioner SEAVEY. Yes.

Mr. PETTENGILL. They do?

Commissioner SEAVEY. Yes.

Mr. PETTENGILL. And between the customers and the several companies?

Commissioner SEAVEY. Yes.

Mr. PETTENGILL. All right.

Then, I would like to know how the purchaser at wholesale, interstate, suffers because the State commission has no regulation over the service or rates charged; how does he suffer?

Commissioner SEAVEY: Well, he suffers because the State has no control over the interstate energy that is sold at wholesale in his States.

APPENDIX J

New York Times, June 8, 1935,
"Utility Foes Map Floor Fight"

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New York Times
Saturday, June 8, 1935
FINANCIAL 23L

UTILITY BILL FOES MAP FLOOR FIGHT

Attack on 'Death Sentence' is Expected to Win Backing in Senate Next Week.

'INTRASTATE' IS SPECIFIED

Other Amendments Accepted by Wheeler, Most of Them Restricting Its Scope.

Special to The New York Times

WASHINGTON, June 7.—Amendments to clarify the Wheeler-Rayburn Public Utility Holding Company Bill so that it specifically will not apply to intrastate business were accepted in the Senate today as the drive began to lessen the harsher provisions of the measure and to bring a final vote upon it next week.

Preceding presentation of many amendments, some adopted and others passed over, an agreement was reached to limit debate for each Senator to fifteen minutes on the bill and ten minutes on an amendment starting Monday, a program which it is hoped will assure a vote that day or Tuesday.

Before the last ballot, opponents will make two moves, one to re-commit the measure, the other to re-write Section 11, the "death sentence," down to a point where the Securities Commission, instead of killing the "unnecessary" corporations, would exercise a rigid control of all of them.

The recommittal move will, it is said, be defeated, but there are strong indications that revamping of Section 11 will be brought about.

Senator Wheeler, the bill's sponsor, offered one of the modifying amendments, providing that the Securities and Exchange Commission will exempt holding companies or subsidiaries, except where it is found that sale or distribution of securities, "by any means or instrumentality of interstate commerce,"- is detrimental to protection of investors.

Two Bailey Clauses Accepted.

In two other amendments, Mr. Wheeler agreed to protect corporations whose subsidiaries across State lines are insignificant, and to exempt companies organized in the United States but doing a foreign business.

Of forty-one amendments which Senator Bailey has offered, Senator Wheeler accepted two, considered very important by Mr. Bailey. One would permit holding companies owning stock in operating companies to purchase more stock if not against the public interest.

The other would eliminate the requirement that holding companies which registered with the Securities Commission must sign an agreement to enforce compliance with the control regulations of the commission.

Resentment against making the measure too drastic flared up on the floor when Senator McKellar told the Montana Senator that he might "get in trouble with this bill" if it was written in too severe a fashion.

The Senate, was discussing an amendment offered by Mr. Wheeler and approved, whereby the commission, instead of some outside party, would be made receiver or trustee if a court judged a utility corporation bankrupt.

This amendment, Mr. Wheeler explained, was to prevent the exercise of any "racket in bankruptcies," such as has occurred in various sections in the past.

White Exemptions Added.

Mr. Wheeler accepted an amendment by Senator White exempting corporations not primarily concerned in electric generation and supplying 75 per cent of their out put to another company. Mr. White said there were many instances of this kind in Maine.

Senator Wheeler smiled broadly when Senator Bailey proposed an extensive modification of the authority to the Federal Power Commission to determine statistics of a corporation before fixing utility rates. Mr. Bailey will presumably press the amendment on Monday.

The bill's definitions of "public utility, electric utility and holding company" were criticized by Senator White, who said:

"These definitions make it perfectly clear that any company engaged in intrastate commerce can be regulated."

Of the delegation of authority he said:

"This language lays down no statutory standard, no rules, but in the end leaves it all to the commission."

APPENDIX K

Hearings Before the Committee on Interstate and Foreign Commerce House of Representatives 74th Congress, 1st Session, (1935), excerpts from Testimony of John E. Benton, General Solicitor, NARUC

K-1

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

HEARINGS

BEFORE THE

COMMITTEE ON INTERSTATE COMMERCE
UNITED STATES SENATE

SEVENTY-FOURTH CONGRESS

FIRST SESSION
ON

S. 1725

TO PROVIDE FOR THE CONTROL AND ELIMINATION OF PUBLIC-UTILITY HOLDING COMPANIES OPERATING, OR MARKETING SECURITIES, IN INTERSTATE AND FOREIGN COMMERCE AND THROUGH THE MAILS TO REGULATE THE TRANSMISSION AND SALE OF ELECTRIC ENERGY IN INTERSTATE COMMERCE, TO AMEND THE FEDERAL WATER POWER ACT, AND FOR OTHER PURPOSES

APRIL 16 TO 29, 1935

PRINTED FOR THE USE OF THE COMMITTEE ON INTERSTATE COMMERCE

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1935

STATEMENT OF JOHN E. BENTON, GENERAL SOLICITOR, NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, WASHINGTON, D.C.

(746) Mr. BENTON: Mr. Chairman, my name is John E. Benton. I am the general solicitor of the National Association of Railroad and Utilities Commissioners. My office is at 808 Earle Building in this city.

I have presented to the reporter certain amendments which, on behalf of the association, I request be made to the pending bill, if it shall be reported by the committee. I shall be glad if those amendments may be printed at this point, at the beginning of my statement.

The CHAIRMAN: Very well.

(The amendments referred to are as follows:)

(747) AMENDMENTS PROPOSED TO S. 1725 BY THE STATE COMMISSIONS REPRESENTED IN THE MEMBERSHIP OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

(Words inserted are italicized. Words struck out are so shown)

AMENDMENTS TO TITLE I. BEGINNING ON PAGE 1 OF THE PRINTED BILL

At page 6 of the printed bill, amend section 2 by adding four new paragraphs, as follows:

"(d) No provision of this title shall apply to any holding company or subsidiary thereof, or public utility company which operates only in a single State under the laws of which it was organized or exists as respects any operation or business which is subject to the regulation of such State.

"(e) No public-utility company which is engaged in intrastate commerce through the rendering of intrastate utility service shall solely be reason of relationship as a subsidiary or as an

affiliate of a holding company, or of any company which is a subsidiary or an affiliate of a holding company, be held to be subject to any provision of this title.

"(f) Nothing contained in this title shall be deemed in any way to affect or to minimize the regulation and control over public-utility companies by the respective State commissions, and whenever, by the laws of any State, the State commission is given control over the issuance of securities by, or other transactions of, public-utility companies, the jurisdiction of such State commission shall be exclusive as to any matters over which it has jurisdiction.

"(g) No provision of this title shall apply to a public-utility company, the major part of the business of which is not subject to the jurisdiction of the Commission, solely by reason of the fact that such public-utility company controls another public-utility company operating in another State, the major part of the output of which, measured in volume, is transmitted to said controlling public utility, and is used by it for sale to consumers in intrastate commerce or in local distribution."

Amend the bill by striking out all of section 4(c) on pages 15 and 16 following:

"(e) ~~The Commission shall have power conditionally or unconditionally to exempt any holding company from the provisions of this section if it deems such exemption necessary or appropriate in the public interest and not detrimental to the interest of investors or consumers upon a showing that the business of such holding company and of every subsidiary company thereof is exclusively intrastate in character and confined to a single State in which such holding company and all of its subsidiary companies are organized. The Commission may, after notice and opportunity for hearing, withdraw such exemption whenever in its judgment the circumstances warrant such withdrawal.~~" .

Amend the bill at page 28 by striking out section 8 (b); following:

"(b) After January 1, 1937, it shall be unlawful for any registered holding company which, or any subsidiary company of which, is an electric utility company to own or operate, or to have any interest, directly or indirectly, through the ownership of control of securities by such holding company or any of its subsidiary companies, or otherwise, in any company which owns or operates capital assets for the transportation of natural gas in interstate commerce, or for the production of natural gas."

At page 31 of the printed bill, amend section 9 (c) to read as follows:

"(c) A registered holding company or a subsidiary company thereof may invest its funds in (1) securities of, or securities the principal or interest of which is guaranteed by, the United States, a State, a municipality or other political subdivision of a State, or any department or independent establishment of any of the foregoing or agency or corporation which is wholly owned, directly or indirectly, thereby; and (2) such other readily marketable securities, within the limitation of such amounts, as the Commission may by rules and regulations permit as appropriate for investment of current funds: *Provided, however, That nothing in this Act shall exempt any public utility company from obedience to the law of any State within which it operates.*"

At page 57, amend section 15 (e) to read as follows:

"(e) After the Commission having jurisdiction thereof has prescribed the form and manner of making and keeping accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records to be kept by any company hereunder, it shall be unlawful for any such company to keep any accounts, cost-accounting procedures, correspondence, memoranda, papers, books, or other records other than those prescribed or such as may be approved by the Commission having jurisdiction thereof, or to keep its accounts, cost-

* * * * *

(760) Mr. BENTON: Mr. Chairman, I recognize the difficulty of securing the attendance of members of the committee when the Senate is in session.

The CHAIRMAN: You may proceed.

STATEMENT OF JOHN E. BENTON, GENERAL SOLICITOR, NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, WASHINGTON, D.C.—Resumed.

Mr. BENTON: Mr. Chairman, before the recess I was saying that the State commissioners felt that legislation enacted by the Congress with respect to holding companies should be confined to holding companies which operate outside the States where they are organized.

A State is competent to control the operations of holding corporations and of public-utility companies created by it and operating wholly within its own borders. No interstate-commerce feature is involved in the operations of such companies; and the evils described in section 2 do not arise from those operations. We ask that such intrastate companies be altogether excluded from the scope of the bill.

We ask also that the holding company title portion of the bill be confined in its effect to holding companies, and that no public utility be subjected to regulation under the holding company section solely by reason of its relationship as a subsidiary or an affiliate of a holding company. Whatever regulation Congress deems proper to impose on electric utilities we ask to have included in title II of the bill which ostensibly relates to them.

While the State commissions favor Federal regulation of the wholesale transactions of electric utilities, they urge that the legislation should go no further than is necessary to protect the public interest in this field which is beyond the reach of State regulation.

The amendments which we have presented to title II accordingly are designed to limit the jurisdiction to be conferred

by Congress upon the regulating Federal commission to the regulation of wholesale transactions where electric energy is purchased at wholesale for ultimate resale to the consuming public.

Before taking up the amendments, I wish to say this: It may appear that we have been over-meticulous and repetitive in the provisions which we have asked Congress to insert for the preservation and protection of State powers. However, the State commissions have learned from bitter experience that too great care cannot be taken in this respect.

When Congress passed the act to regulate commerce in 1887, it placed in the first section of that act this seemingly explicit provision:

Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

Yet, notwithstanding that declaration, a provision in the third section of the act forbidding discrimination against persons or places, was construed to give the Interstate Commerce Commission the power over intrastate rates, which was exercised in the *Shreveport case*, and today State jurisdiction has become not much more than a shadow in the railroad field. The State commissions do not wish to repeat that experience in the utility field. Accordingly, they have sought in, (761) the amendments offered to title II of this bill to separate the field within which the Federal regulatory commission may exercise jurisdiction from that which is reserved to the States, and to make that separation so clear and explicit throughout the bill that there may be no opportunity for judicial construction to make the legislative purpose miscarry.

Mr. CHAIRMAN, at this point I take up the *Pennsylvania Gas Co. case*, and some other cases. Without reading that portion of

my statement if it may be made a part of the record I will pass on.

The CHAIRMAN: Very well.

Mr. BENTON: You will notice that in the resolution adopted at our annual convention in 1929, the Congress was asked not to invade the field of local service, but to leave that field to the State authorities. The position then taken by the association has been consistently maintained ever since. And in that resolution the *Pennsylvania Gas Co. case* (252 U. S. 23, 30) is cited. That is the case in which the United States Supreme Court held that the Public Service Commission of New York could regulate the rate for gas sold to local consumers in New York, although the company selling it produced the gas in Pennsylvania and delivered the same across the State line to the customers in New York. The Court in its opinion said:

The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from Federal control * * * The thing which the State commission has undertaken to regulate, while part of an interstate transmission is local in its nature and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State; nevertheless, the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing as to consumers in a city. This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted

is part of interstate commerce, its regulation in the distribution of gas to local consumers is required in the public interest, and has not been attempted under the superior authority of Congress. It may be conceded that the local rates may effect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress, enabling it to exert its superior power under the commerce clause of the Constitution.

It was said before the House committee that the *Pennsylvania Gas Co. case* has been overruled in *East Ohio Gas Co. v. Tax Commission* (283 U. S. 465). It was not overruled on the point now under discussion. The *East Ohio Gas Co. case* was a tax case. The State of Ohio had levied an excise tax upon the gross receipts of gas utilities from sales to consumers. The East Ohio Co. sought to enjoin the collection of the tax upon the ground that its gas in large part was brought into Ohio from other States. The company depended upon the well-established principle that a State may not tax the proceeds of interstate business. If the sale to consumers of the gas brought into Ohio by the distributing company was interstate commerce, the tax was invalid. It was accordingly necessary for the court to hold the sales intrastate to sustain the tax.

(762) The company cited the *Pennsylvania Gas Co. case* to establish the interstate character of the commerce, the court in that case having said that what was dealt with there was interstate commerce.

In the *Ohio case* the court held that, under circumstances shown in the record in the *Ohio case*, the sales to consumers were intrastate in character. The court ruled that after gas had been brought into the State under pressure, and then the pressure had been reduced for the purpose of enabling distribution to consumers, the stepping down in the pressure of the gas marked the end of interstate commerce, and that all that took place thereafter was intrastate commerce. The court disposed of the

Pennsylvania Gas Co. case by saying that it did not appear that the point upon which the *Ohio case* was determined was presented to the court in the *Pennsylvania case*, but that if it was presented the case was disapproved to the extent in conflict with the decision made in the *Ohio case*. I quote from the opinion the exact language used:

It does not appear that there were presented in *Pennsylvania Gas Co. v. Public Service Commission*, to the State court or where the considerations on which it is held that interstate commerce _____ over intrastate business begins when gas flowing through pipe lines from outside the State passes into local distribution systems for delivery to consumers in the municipalities served. But, however that may be, the opinion in the *Ohio case* be disapproved to the extent that it is in conflict with our decision here.

This decision accordingly in no way whatever conflicts with the principle discussed and applied in the *Pennsylvania Gas Co. case*, which was that being to consumers, even though made in interstate commerce, are local to their character and subject to State regulation so long as Congress does not destroy the field.

That this was the point deemed in the *Pennsylvania case* and that the decision rested on that point as shown by the following language from the opinion of Mr. Justice Sutherland in *Barrett v. Kansas Natural Gas Co.* (289 U. S. 298-308).

There the Gas Co., a Pennsylvania corporation, transmitted gas from Pennsylvania into New York and sold it directly to the consumers. The service to the consumers, which was the thing for which the requested charge was made, was essentially local, and the decision rests upon this nature.

The CHAIRMAN: Isn't it true, that all States do not have commissions with full jurisdiction in the matter of regulatory powers over all activities of public utilities.

Mr. BENTON: There are a few which have not.

The CHAIRMAN: (continuing). In many States the regulatory commissions are limited to certain specific things, and their powers are not broad enough to cover really a full investigation of the public utilities.

Mr. BENTON: Perhaps that is an overstatement. I do not think that is true of many of them.

The CHAIRMAN: As I stated this morning, for instance some legislatures have hampered their commissions by not giving them sufficient funds to carry on their investigations to the point where they can really render a public service.

Mr. BENTON: It is true as you state, Mr. Chairman, that in some States the appropriations are inadequate. That is another aspect of the matter, not covered by this bill.

(763) Of course, the amount of service of this local character which passes over State lines, is not very great. The question arises whether for the sake of supplying regulation which has not as yet been supplied for service to the comparatively few people who would obtain it, if you should pass an act going to the full limit that Congress could go in the exercise of its constitutional powers; you should enact a bill which would break down the regulatory powers of the many States which have provided their people with local commissions, which for the most part are reasonably well financed, and are effectively regulating the local service in those States.

The CHAIRMAN: Do you not think there is a general feeling in this country to the effect that the local utility commissions have not done a very satisfactory job with reference to rates charged by utility companies?

Mr. BENTON: Personally I do not think so. I do think that you now and then find allegations of that sort made, but in my own judgment, since you have asked the question, that feeling is not very general. It is not very generally believed that the local regulatory commissions have not done a good job.

At least, I flatter myself that that was not the feeling in the State of New Hampshire, when I was honored by being a commissioner there. I know that that was not the feeling when

Senator Brown was acting as a commissioner in New Hampshire. And I do not believe it is the feeling in the State of Indiana, where Senator Mintou at one time was counsel for the commission. In my judgment that is not true generally.

I do not mean to say that in the 48 States—or inasmuch as Delaware does not have a State commission I will say in the 47 States—that you always have in those 47 States well chosen commissioners who are acting as effectively as they should act. But I think you are getting in the regulatory field as good service as the people are entitled to. If the people are taking an interest in seeing that they are well served by their officials, then they are well served. If they go to sleep and allow individual commissioners to get elected or appointed who neglect their duties, then it may happen in such instance that the commission may not give good service—I do not think it is happening generally.

Senator BROWN: Is not a great deal of the trouble the matter of getting enough money out of the legislature? That is; they give their commission authority enough but do not give them money enough to work with. Do you think that is more or less general?

Mr. BENTON: I think it is true, especially since the depression, that appropriations have been cut below what they ought to have been cut. At the same time there is a movement going on to increase appropriations. Some of our commissions are better supplied with funds today than ever before since their creation. There is a very considerable movement to place the cost of public service regulation upon the regulated utilities; by means of some form of direct assessment of the cost upon the utilities, which in the end of course is borne by the people who receive the service and pay for it. If the service is worth what it costs, the people who get the benefit of it properly pay for it in the end.

The CHAIRMAN: This bill expressly provides that local rates shall be determined by the State commissions, does it not?

(764) Mr. BENTON: Yes. It is designed to do that, and we recognize—

The CHAIRMAN: (interposing). Why should a State commission object to having the Federal Government get information and turn it over to them?

Mr. BENTON: They do not.

The CHAIRMAN: That is, provided they themselves are the ones who are going to finally determine what the rates shall be.

Mr. BENTON: I do not think they should object. And the association for which I speak not only does not object, but it ask the Congress to enact that kind of legislation. As a matter of fact our association, I think some 3 years ago, passed a resolution asking the Congress to set up a commission to do exactly that sort of thing.

The CHAIRMAN: This bill also provides for joint boards. That is, the bill provides that the commission may appoint joint boards to take up matters with the local commissions in the States where a matter affects them.

Mr. BENTON: I know it does that. It is the same sort of provision that you put into the Communications Act. We think it is very helpful. We recognize that the purpose of this bill is to bring about improvement in the law, to bring about the reforms which are necessary in the public interest, and that we approve. But we are desirous that the Congress in doing that shall not inadvertently so draw the law as to break down the local regulatory agencies.

The CHAIRMAN: I do not think there is any intention to break down the local regulatory bodies. On the contrary, I think the drafters of the bill intended to strengthen the State commissions.

Mr. BENTON: I believe that is true. I am now speaking about section 2. I am unable to see how title I could have been drawn by anyone who was very solicitous for the preservation of the powers of the local regulatory agencies. I had some discussion about title II with members of the Federal Power Commission, who I assume aided you in drawing the bill, and I know that—

The CHAIRMAN: (interposing). They did more than aid me. [Laughter.]

Mr. BENTON: I am perfectly certain that the members of the Federal Power Commission desired to see the regulatory powers of the State commissions preserved. Yet there are certain provisions in the bill which, if they were enacted just as they now stand, would be very destructive of State powers, as I think I shall be able to point out to you as I go along.

The CHAIRMAN: All right. You may proceed.

Senator BROWN: Mr. Benton, take the case of a fly-by-night promotion company that buys up 6 or 7 or 8 small gas, electric, and waterworks companies, with an engineer in charge in the State but who has no authority except to look out for the plant, and the president or the vice president of the company is located, say, in New York, or at least out of the State, how is the State commission going to regulate that situation, particularly when the president, we will say, who is in New York, which is outside the State, has an office beyond your jurisdiction, and when you call his office they say he is at his residence, and if you call his residence they say he is at his office, and they keep you running back and forth for a period of months, just how are you going to get at that matter?

(765) Mr. BENTON: That is the kind of situation which, as I have said, our association thinks the Congress should take care of by Federal regulation because the States—

Senator BROWN: (interposing). That is an entirely intrastate operation so far as the companies are concerned.

Mr. BENTON: As to the operating company itself, of course the local commission would have no trouble in regulating it. But the operations of the holding company in New York the State commission cannot regulate.

Senator BROWN: I do not know whether the State can regulate that situation even. For instance, these men who are in the plant have no authority, have no figures, and I am just assuming that you have a set of men who are not amenable to regulation; what are you going to do about it?

Mr. BENTON: I see what you are talking about now, I think. You are asking me the question: How is the State going to

regulate that local utility intelligently when the men who are operating the utility in New Hampshire are not the responsible people who direct the actions of the company, and do not have the information that the local utility commission needs in order to make its orders intelligently?

Senator BROWN: They know nothing about it.

Mr. BENTON: That is exactly the situation where the State is impotent. But it will not be impotent if the Congress creates a commission which has full regulatory power over the holding company, and may require the holding company to keep its books in an understandable manner, which will place the information the State commission needs in the hands of the States commission.

The CHAIRMAN: That is exactly what this bill proposes to do.

The BENTON: And that is exactly what we are here saying we think you ought to provide for by an act of Congress.

The CHAIRMAN: All right.

Mr. BENTON: I started, Mr. Chairman, to read a quotation from the *Pennsylvania Gas Co. case*, following with some further discussion and citations, but I believe it was agreed that that may go into your record without reading.

The CHAIRMAN: That is understood.

Mr. BENTON: At our last convention, held in November 1934, the legislation which is now before us was being talked about. It was understood to be in course of preparation. There was very genuine alarm among State commissioners lest the legislation should be in such form that State powers would be annihilated, as they were in the railroad field; and a resolution of protest was presented to the executive committee. This resolution was redrafted and adopted. The redrafting was to make acknowledgment of the helpful attitude of the administration of which Congress is so large a part in its action on the Communications Act and on the Johnson bill, in extending protection to the local State authorities. The resolution, however, reaffirmed the stand of the association taken in 1929. I will read the resolution, as follows:

While we appreciate the aid given to our representatives during the year by the national administration in protecting the rights of the State regulatory bodies and aid helped spirit of many officials engaged in the Federal field where there is joint interest and jurisdiction, and while we recognize the need of cooperation on the part of State regulatory bodies where there is such joint interest and jurisdiction, we are of the opinion that there is a possibility of unnecessary attempts (766) to assume or acquire jurisdiction by the Federal Government or some branch thereof in the field of purely local or State regulation and police power.

Be it therefore resolved, That this association reiterates its stand taken in previous years in the passage of various resolutions in relation thereto, to the effect that the association is opposed to any encroachment upon the regulatory jurisdiction of the States, as not being compatible with the local public interest which can best be served through agendas chosen by those whom existing problems affect.

In setting up the National Power Policy Committee the President gave voice to the principle which we have asked the Congress to apply, and in speaking of legislation to be enacted by the Congress he said:

Since a number of the States have commissions having jurisdiction over intrastate power matters, it is necessary that whatever plan is developed should have regard to the powers of these various State commissions as well as of the States in general.

Our appearance here is to renew our acknowledgment and our expressions of appreciation of the disposition which has been shown by the Congress and by the President to preserve the local agencies, which the States have created for the protection of their people, from being disabled or broken down, and to point out to the committee respects in which we think this bill must be

amended to bring it into harmony with the purpose of the President and the Congress to preserve and strengthen these local agencies.

The association approves Federal legislation for the regulation of holding companies, and of wholesale transmission and sale of electric energy and gas. As I have already said; the association favors well-considered Federal legislation which will end the evils and abuses now known to result from holding-company operations, and which shall provide for the regulation of the wholesale transmission and sale of electric energy.

I do not mean to say that there is absolute agreement with respect to this legislation among the 47 commissions represented in our association. Such agreement would not be expected concerning a bill which has aroused so much apprehension and controversy as the pending bill has aroused. The bill has, however, received intense committee consideration, and the position now taken by the association has been carefully formulated. I shall state to you the manner in which the bill has been considered and the action taken thereon and the manner in which the several commissions have been kept advised concerning that action; and I shall present to you such expressions of dissent as have been received from any commission.

Holding companies escape the reach of State authorities when they operate outside the State in which organized. It is for this reason that the association favors Federal legislation, provided it is so drawn as to apply only to interstate holding companies.

It is evident that a State commission cannot reach beyond the borders of the State to investigate, to call witnesses, and to control corporate acts. Even when a commission can secure evidence which satisfies it that holding-company control is being used to impose improper costs upon an operating utility subject to its jurisdiction, it is nevertheless restricted in its action and powers.

In the *Southwestern Bell Telephone Co. case* 262, U.S. 276; the United States Supreme Court had before it an order of the

Missouri commission reducing telephone rates. The order was based in part upon a (767) finding by the Missouri commission that the service contract between the Southwestern Bell and its parent company, the A.T.&T., under which the subsidiary paid to the parent company 41/2 percent of its gross revenues for certain financial and other services provided by the holding company through its New York office, resulted in overpayment for those services, and in an overstatement of operating expenses. The court overturned, that over, upon the ground, among others, that the commission had no right to go into that contract, because that was an invasion of the field of management.

I want to read the portion of the opinion dealing with that service contract because, while the ruling has been in part by implication overruled since Mr. Hughes because Chief Justice, it has been so overruled only in part.

In the *Southwestern Bell case* the Court said:

Four and one-half percent is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in-error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public-utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.* (291 Ill. 209, 234, P. U. R. 19200, 640, 125 N. E. 891):

"The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers."

Upon that point there was no dissent. The decision gave the State commissions much concern. It seemed to them indefensible that a holding company should be able through a subsidiary to make a contract with itself which, though appearing to the commission unreasonable, on the basis of evidence before the commission, could not be attacked without a showing of bad faith. That, however, was the ruling of the court.

The decision, I think I may say, was never acquiesced in by the State commissions. Finally, another telephone rate case came to the United States Supreme Court involving purchases of equipment by the Illinois Bell Telephone Co. from the Western Electric Co., both being subsidiaries of the American Telephone & Telegraph Co.

The company depended upon the Southwestern Bell decision to establish that any inquiry into the prices paid for equipment bought by the operating utility was an invasion of the field of management. On this point, however, the Court, through Chief Justice Hughes, ruled with the commission; and sustained its right to inquire into the cost of the equipment to the Western Electric Co., 282 United States 133, 152, 153.

Wholesale interstate utility service is not subject to State regulation. It has for a long time been held by the United States Supreme Court that a State cannot regulate the price for gas sold at wholesale by a company which transmits the gas in interstate commerce. *Public Utilities Commission of Kansas v. Landon* 249 United States 285; *Kansas Natural Gas Co. case*, 265 United States 297.

In the *Attleboro Electric Light Co. case* this principle was applied for a contract for the sale of electric energy at wholesale, 273 United States 83, 87.

(768) In that case the Rhode Island commission sought to fix the price to be paid the generating company in Rhode Island for power taken into Massachusetts and distributed there. The Court held that the transaction was interstate in character and beyond the power of the State to regulate. I will read a portion of the opinion:

In the *Pennsylvania Gas Co. case* the company transmitted natural gas by a main pipe line from the source of supply in Pennsylvania to a point of distribution in a city in New York, which it there subdivided and sold at retail to local consumers supplied from the main pipes laid through the streets of the city. In holding that the New York Public Service Commission might regulate the rate charged to these consumers, the court said that while a State may not "directly" regulate or burden interstate commerce, it may in some instances, until the subject matter is regulated by Congress, pass laws "indirectly" affecting such commerce, when needed to protect or regulate matters of local interest; that the thing which the New York commission had under taken to regulate, while part of an interstate transmission, was "local in its nature", pertaining to the furnishing of gas to local consumers, and the service rendered to them was "essentially local" being similar to that of a local plant furnishing gas to consumers in a city; and that such "local service" was not of the character which required general and uniform regulation of rates by congressional action, even if the local rates might "affect" the interstate business of the company.

In the *Kansas Natural Gas Co. case* the company, whose business was principally interstate, transported natural gas by continuous pipe lines from wells in Oklahoma and Kansas into Missouri, and there sold and delivered it to distributing companies, which then sold and delivered it to local consumers. In holding that the rate which the company charged for the gas sold to the distributing companies—those at which these companies sold to the local consumers not being involved—was not subject to regulation by the Public Utilities Commission of Missouri, the court said that, while in the absence of congressional action a State may generally enact laws of internal police, although they have an indirect effect upon interstate commerce, "the commerce clause of the Constitution, of its own force, restrains the States from importing direct burdens upon interstate commerce," and a State enactment imposing such a

"direct burden" must fall, being a direct restraint of that which in the absence of Federal regulation should be free. * * *

It is clear that the present case is controlled by the *Kansas Natural Gas Co. case*. The order of the Rhode Island Commission is not, as in the *Pennsylvania Gas Co. case*, a regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett Co. for the interstate service to the Attleboro Co., which places a direct burden upon interstate commerce. Being the imposition of a direct burden upon interstate commerce, from which the State is restrained by the force of the commerce clause, it must necessarily fail regardless of its purpose.

That case has been accepted by everybody as establishing the distinction between wholesale and retail business and as establishing the fact that the State cannot regulate wholesale transactions, although it can regulate retail service and rates. It therefore follows that if there is to be any regulation of the wholesale part of the electric and gas business which passes over State lines it must be supplied by the Federal Government.

State commissions may pass upon the reasonableness of payments made by operating companies to affiliates: The Illinois Bell Telephone case, which I have cited, appeared to establish the principle that a State commission may examine contracts between affiliated companies and may refuse to recognize payments made to an affiliate in excess of the value of the service obtained from the affiliate. That this has been clearly established in two cases decided since the opinion in that case was rendered. I incorporate into the record citation of these cases both decided by the United States Supreme Court, with the volume and page where each case will be found. In both of these

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APPENDIX L

Hearings Before the Committee on Interstate and Foreign Commerce House of Representatives 74th Congress, 1st Session, (1935), excerpts from Testimony of Dozier DeVane, Solicitor, Federal Power Commission

L-1

PUBLIC UTILITY HOLDING COMPANIES

HEARINGS

BEFORE

THE COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

SEVENTY-FOURTH CONGRESS

FIRST SESSION

ON

H. R. 5423

TO PROVIDE FOR CONTROL IN THE PUBLIC INTEREST OF PUBLIC UTILITY HOLDING COMPANIES USING THE MAILS AND THE FACILITIES OF INTERSTATE COMMERCE, TO REGULATE THE TRANSMISSION AND SALE OF ELECTRIC ENERGY AND NATURAL GAS IN INTERSTATE AND FOREIGN COMMERCE, AND FOR OTHER PURPOSES

PART 1

FEBRUARY 19, 21, 22, 26, 28, MARCH 1, 5, 6, 7, 8, 9, 12, 13, 1935

PUBLIC-UTILITY HOLDING COMPANIES

SATURDAY, MARCH 9, 1935

House of Representatives,
Committee on Interstate And Foreign Commerce,
Washington, D.C.

(449) The committee met, pursuant to adjournment, at 10 a.m., Hon. Sam Rayburn (chairman) presiding.

STATEMENT OF DOZIER DeVANE, SOLICITOR, FEDERAL POWER COMMISSION, WASHINGTON, D.C.

The CHAIRMAN. The committee will come to order.

We have this morning Mr. DeVane, solicitor for the Federal Power Commission, who will attempt to explain the provisions of title II of the bill.

MR. DEVANE. Mr. Chairman and members of the committee, it is my understanding that at the conclusion of the hearing on yesterday your chairman announced that he would like for the hearing this morning to start with an explanation of title II of the bill; first, with an explanation of the amendments to the Federal Water Power Act—or whether he made that announcement himself or not, that is the way I prefer to present it and secondly an explanation of title II of title II.

MR. PETTENGILL. For the purpose of the record, sir, I would be glad to know who you are, and your experience.

MR. DEVANE. Well, my name is Dozier DeVane. I am solicitor for the Federal Power Commission.

MR. PETTENGILL. An attorney at law?

MR. DEVANE. An attorney at law and have been practicing since the fall of 1908.

Is there any more that you would like to know about my experience?

MR. PETTENGILL. How long have you been with the Power Commission?

MR. DEVANE. I have been with the Power Commission since the 8th of November 1933.

MR. PETTENGILL. And previous to that?

MR. DEVANE. Well, I will start back from the time I began the practice of law.

MR. PETTENGILL. Well, not in too great detail.

MR. DEVANE. I am a graduate of the Law School of Washington and Lee University. I began the practice of law in Tampa, Fla., in 1908 when I was admitted to the bar, and practiced there until the - of January 1918, when I became general counsel for the Railroad Commission of Florida.

I may say in that period I served 2 years as county attorney for the county where I resided. I was with the railroad commission 3 years,

* * * * *

(489) The purpose of that change is to avoid complications that have arisen and will continue to arise by persons proceeding with the construction of projects in waters over which Congress may have jurisdiction without a determination in advance that a license is or is not necessary. Then we strike out, near the bottom of that same page, the words "proceed with such construction" and substitute "construct, maintain, or operate such dam or other project works" making it read "Shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this act."

That is to remove questions that would otherwise undoubtedly be raised in cases that will probably be brought in the future as to whether or not after a project has been constructed, the provisions of the Federal Water Power Act are applicable.

It would be argued, no doubt, in those cases that the project having been completed, the provisions of section 23 are not applicable and we hope to prevent that from arising in the future.

At this point, Mr. Mapes, I think we might clear up the difficulty that I had in answering a question that you asked me on Saturday.

You will observe that under subsection (b) of section 23, persons desiring to construct projects in waters over which Congress has jurisdiction, but which may not be looked upon as navigable waters, as such, may come to the Commission under a declaration of intention and have determined in advance of the construction whether or not a license is necessary.

That provision in section 23 is broader than the language in section 3, where the definition of navigable waters is used, the one that you were asking me about, on Saturday.

The definition of navigable waters in section 3 applies only to those waters that are in fact navigable.

Section 23 applies to waters that are not in fact navigable, but where construction may affect interstate or foreign commerce.

The provisions in section 4 with reference to the issuance of licenses uses the language "navigable waters"; for which we now propose, streams and other bodies of water over which Congress has jurisdiction."

If section 4 should be narrowly construed it can be argued that although the act requires a license under section 23, and prohibits the construction until a license has been issued by the Federal Power Commission, there is no authority in the act except in section 4 for the issuance of a license. As I told you on Saturday, it was argued in the Appalachian case that the provisions of section 23 were like the passage of a law creating a crime and providing no penalty. That is, Congress passed a law and prohibited this construction, but made no provision by which the license could be issued.

The act has been construed otherwise.

Undoubtedly, any reasonable construction of the act would lead anyone to the conclusion that the Commission could issue a license in such a case. We propose to remove any argument. I do not think we are removing doubt. All I think we do is to remove argument.

MR. MAPES. Let me be sure that I understand you. As I understand, the Commission has jurisdiction over the projects not only built upon navigable streams, but over projects that may affect (490) interstate commerce even though they are built upon waters that are not navigable or enter into navigable waters.

MR. DEVANE. That is true, sir.

MR. MAPES. Over which Congress would not have jurisdiction unless the project affected interstate commerce.

MR. DEVANE. That is right.

MR. MAPES. Yes. Has the court sustained the Commission in this respect, the jurisdiction of the Commission?

MR. DEVANE. Of nonnavigable waters?

MR. MAPES. Yes.

MR. DEVANE. You are asking about the jurisdiction of Congress over these nonnavigable waters, that affect navigation?

MR. MAPES. Yes.

MR. DEVANE. Yes; the jurisdiction of Congress over such streams was upheld in the case of the *United States v. Rio Grande Dam –gation Co.*, 174 U. S. 690. That was decided under the Rivers Harbors Act of 1899, which in effect is the same as section 23 of the act.

Also the district court, Judge Way, sustained the Commission's jurisdiction in such cases in the Appalachian case, but that particular point was not passed upon by the Court of Appeals, or the Supreme Court in that case.

MR. MAPES. My understanding of that position is that 63 out of 125 applications for permits have been made.

MR. DEVANE. Yes, sir.

MR. MAPES. And the Commission found that 63 did not come within the jurisdiction of the Commission.

MR. DEVANE. That is right. That they were going to be constructed in waters that would not affect interstate or foreign commerce in accordance with the findings made by the Commission in a particular case.

MR. MAPES. I hope you will be able to tell before you get through how large those 63 projects were.

MR. DEVANE. How large they were?

MR. MAPES. Yes.

MR. DEVANE. That may take a little time, but if you will give us time, we will be glad to furnish that information before these hearings are closed.

The only other amendment that I need to refer to is to section –. You will observe an amendment made at the end of that section. I won't bother to read it, because I ask that it be eliminated.

The Forest Service suggested that we take over the supervising permits that had been issued by it for some projects on Government lands, which is under its supervision. The amendment here is part of that proposed amendment to the act. After careful consideration of the question, the commission determined that it would notify Congress to give it that authority.

The CHAIRMAN. That is, the provision at the bottom of page 29 of the memorandum?

MR. DEVANE. Yes; and that is at the bottom of page 29.

The rest of the language was stricken out, but in some way failed to get out.

Now, with that, unless there are some questions in connection to the other amendments to the act, I will be glad to pass to title II of title II of this bill.

* * * * *

(496)MR. DEVANE. I have it here, and I would like to have it read into the record, a statement showing in each State the jurisdiction over accounting, capitalization and securities, depreciation, rates, and services.

It shows that 12 States have no jurisdiction over accounting, that 18 States have no jurisdiction over capitalization and securities, 36 States have no jurisdiction over depreciation; and that 7 States have no jurisdiction over rates and services; and you can, from that memorandum, see which of the States have jurisdiction with reference to the several subject matters mentioned.

MR. PETTENGILL. May I ask at that point, has there been any effort made to obtain uniform State legislation governing the power industry?

MR. DEVANE. No, sir.

MR. PETTENGILL. Would that not be a rather desirable way of going about some of these objectives?

MR. DEVANE. Well, the American Bar Association, which is the initiator of such legislation, has never made any progress in that direction. Each State wants to pass its own regulatory laws, and it has never, so far as I know, been considered by the American Bar Association, and it has never met with any enthusiasm or cooperation by the members of the public-utilities section of the association.

(The statement above referred to is as follows:)

State control over electric public utilities. May 16, 1934[1]

State	Accounting	Capitalization issues of Securities	Depreciation	Rates	Services
Alabama	Yes	Yes	Limited	Yes	Yes
Arizona	Yes	Yes	Yes	Yes	Yes
Arkansas	No	Yes	No	Yes	Yes
California	Yes	Yes	Yes	Yes	Yes
Colorado	Yes	No	Yes	Yes	Yes

[1] No jurisdiction over accounting in 12 States, none over capitalization and securities in 18 States, none over depreciation in 36 States, none over rates in 7 States, and none over services in 7 States.

Connecticut	Yes	No	No	Yes	Yes
Delaware	No	No: no commission.	No	No	No
District of Columbia	Yes	Yes	Yes	Yes	Yes
Florida	No	No	No	No	No
Georgia	Yes	Yes	No(?)	Yes	Yes
Idaho	Yes	No	Yes	Yes	Yes
Illinois	Yes	Yes	Yes	Yes	Yes
Indiana	Yes	Yes	Yes	Yes	Yes
Iowa	No	No	No	No	No
Kansas	Yes	Yes	Yes	Yes	Yes
Kentucky	Yes	Yes	Yes	Yes	Yes
Louisiana	No	No	No	Yes	Yes
Maine	Yes	Yes	No	Yes	Yes
Maryland	Yes	Yes	No	Yes	Yes
Massachusetts	Yes	Yes	Yes	Yes	Yes
Michigan	Yes	Yes	No	Yes	Yes
Minnesota	No	No	No	No	No
Mississippi	No	No	No	No	No
Missouri	Yes	Yes	Yes	Yes	Yes
Montana	Yes	No	No	Yes	Yes
Nebraska	No	Yes	No	Electric only	No
Nevada	Yes	No	No	Yes	Yes
New Hampshire	Yes	Yes	Yes	Yes	Yes
New Jersey	Yes	Yes	Yes	Yes	Yes
New Mexico	No	No	No	Yes	Yes
New York	Yes	Yes	Yes	Yes	Yes
North Carolina	Yes	Yes	Yes	Yes	Yes
North Dakota	Yes	Yes	No	Yes	Yes
Ohio	Yes	Yes	Yes	Yes	Yes
Oklahoma	Limited	No	No	Yes	Yes
Oregon	Yes	Yes	Yes	Yes	Yes
Pennsylvania	Yes	Yes	Yes	Yes	Yes
Rhode Island	Yes	Yes	No	Yes	Yes
South Carolina	Yes	Yes	No	Yes	Yes

(497) MR. DEVANE. I will now take up the provision of the bill. Section 201, page 103, defines the jurisdiction conferred upon the Federal Power Commission by the new title.

It states that—

The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of the energy for such transmission and sale.

Commissioner Seavey has already pointed out that in some way the past few words of the first sentence of this section are not as we should like to have them and suggested after the word "sale", in line 22, the balance of that sentence be stricken out and that there be substituted instead the following:

shall not apply to the retail sale of electric energy in local distribution.

I shall discuss this title upon the assumption that this amendment shall be incorporated in the section.

MR. WOLVERTON. Will you repeat it again?

MR. DEVANE. "But shall not apply to" —

MR. WOLVERTON. In line 22?

MR. DEVANE. Line 22, after the word "sale" [reading]:

shall not apply to the retail sale of electric energy in local distribution.

MR. MERRITT. That means local, in any State, whether the State introduces it or otherwise?

MR. DEVANE. Yes; that is true, and I will come to that in a few moments.

MR. MARTIN. That makes section 201 (a) the same as section 301 (b).

MR. DEVANE. How is that?

MR. MARTIN. That makes section 201 (a) read the same as 301 (b).

MR. DEVANE. That is right, the same as 301 (b), with the change of electric for gas. That is on page 141 of the bill.

Now, in order to get a complete understanding of the effect of section 201 it is necessary that that section be considered in connection with section 211, 214, 217 and 309.

I will make reference to these sections as I talk about section 201. I would like to say first that insofar as rates are concerned that Section 201 is intended to give the Federal Power Commission jurisdiction over the wholesale rates only; rates over which the State (498) commissions have no jurisdiction as decided by the Supreme Court of the United States in the *Public Service Commission v. The Attleboro Steam & Electric Co.* 273 U. S. 83.

Now, that is so far as rates are concerned.

It does not extend the jurisdiction, and it is not intended to extend the jurisdiction to cases such as the *Pennsylvania Gas case* decided by the Supreme Court, where the energy was transmitted in interstate commerce over the State line and sold by the same company for local distribution. It is our opinion that under the decision of the Supreme Court in that case, the jurisdiction of this Commission might be extended to that kind of a case; but this bill does not go that far. The bill only applies to interstate rates at wholesale in interstate commerce.

* * * * *

(518) At the outset of my discussion of title II of title II, I pointed out the provisions in connection with the jurisdiction conferred by the title, called attention to the fact that insofar as rates were concerned the title conferred jurisdiction upon the Federal Power Commission over wholesale rates that were not subject to control by State Commissions under the decision of the Supreme Court in the Attleboro case. I also called attention to the fact that this bill preserves in the State commissions the power to regulate retail rates even where the power is transmitted in interstate commerce, and which might be regulated by this Commission; that we had reserved to the States the principle announced by the Supreme Court of the United

States in the Pennsylvania Gas Co. case; that insofar as facilities were concerned, that the jurisdiction conferred upon the Federal Power Commission was that the Commission should have jurisdiction over transmission facilities that were used in interstate commerce and production facilities that were connected with such transmission facilities.

The necessity for the jurisdiction insofar as facilities are concerned will be discussed in the second part of my discussion of the bill.

The first thing I was trying to do—

The CHAIRMAN. You have 50 minutes, Mr. DeVane.

MR. BULWINKLE. Will he be back tomorrow?

The CHAIRMAN. No.

MR. BULWINKLE. Because of this reason. I thought yesterday we would let him finish his statement.

The CHAIRMAN. I thought that he would finish in 50 minutes.

MR. WOLVERTON. There are a few things that I want to know before we get through.

The CHAIRMAN. Go ahead.

MR. DEVANE. If you will let me make my statement, it may be that a good many of the questions will be answered.

MR. BULWINKLE. That is what I wanted to do, in order to save time.

MR. DEVANE. I indeavored to show on yesterday, how this act would be a complement to State regulation of local rates. I call the committee's attention to section 211 page 116 of the bill, in which the Commission is given the authority to ascertain for the purpose of this title, and title III of title II, the actual legitimate prudent cost of properties of every public utility subject to its jurisdiction. Then I mentioned paragraph (b) of that section, which is merely procedural and gives the Commission access to information for the determination of such costs; and then I was right at the point of asking the committee to permit me to postpone any discussion of subsection (c) of that section at that time—

MR. BULWINKLE. You mean subsection (c)?

MR. DEVANE. Subsection (c) of that section, at this time, because that relates to the powers of this Commission in connection with the fixing of rates and what I am trying to do at this time, before I discuss those matters, is to get clearly before the committee the plan of this bill.

When I have done that, I think we can discuss these legal questions that you may ask me, with a little better understanding.

I now call your attention to the provisions contained in section 214, page 119 of the bill. Subsection (a) provides that the Commission may refer any matters originating in the administration of this act to boards made up of State commissions or State representatives.

(519) that is intended as a cooperative provision and is in practically the exact language of the Communications Act. But I also wish to call your attention to subsections (b) and (c), and particularly to subsection (c) of this section, in which we go further than Congress went with the Communications Act. This subsection makes the body of information that this Commission collects regarding this industry available for the use of State commissions in their regulatory matters, upon their request. In other words, it is a command to the Commission to do the things required under this section and when the State commissions request it, to make the information available to them. That is further cooperation in aid of State regulation of local rates than the Congress has gone either in the Interstate Commerce Act or in the Communications Act.

I next wish to call your attention to section 217, page 122. Notwithstanding the attempt so far as possible to make it clear that the bill does not usurp State authority, we added section 217, which specifically declares that nothing in this title shall be construed to impair or diminish the power of any State commission.

I also wish to call your attention to section 208 (c), on page 115, which provides that the Commission shall, upon request of any State commission, investigate and determine the cost of the

production and/or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such power.

That applies to cases that fall within the Pennsylvania Gas Co. case where the State commission is still left with the power to regulate the rate but due to the difficulties that some of these State commissions have met in their efforts to regulate such rates, because a good part of the property that was used in the production and transmission of that energy was property outside of the State, we thought it desirable to this bill to provide that the State commission could call upon this commission to make a determination of the cost of that property and to submit that information to the States. This provision is intended as a complement to State regulation.

Under section 309, page 132 of this bill, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, and distribution of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission and submit it to Congress.

That is information which is of the character this Congress has directed the Commission to obtain in its rate survey and it is, we think, very beneficial in times of war to the Government; very beneficial to the Congress; and very beneficial to the State commissions.

Now, all of those provisions, when you analyze them, are complements to State regulation and in no way supersede State regulation.

Having given that picture—

MR. WOLVERTON. Mr. DeVane, right there, on the question of investigation: Last year, a joint resolution entitled "Authorizing necessary funds to conduct an investigation regarding rates charged for electric energy and preparing a report thereon", approved April -4, 1934, authority was given to the Federal Power Commission to investigate and compile the rates

charged for electric energy and services to resident, rural, commercial, and industrial consumers (520) throughout the United States, by private and municipal corporations and to report such rates together with an analysis thereof to Congress at the earliest practicable date.

What progress has been made in response to that resolution?

MR. DEVANE. Substantial progress has been made.

MR. WOLVERTON. Has any report been made?

MR. DEVANE. Yes, sir; that is this preliminary report to which I referred this morning.

MR. WOLVERTON. Has it been submitted to Congress?

MR. DEVANE. Yes, sir.

MR. WOLVERTON. It seems to me that the information might be very helpful in considering this bill.

MR. DEVANE. I think it would be, sir. I referred to it on yesterday.

Every Member was mailed a copy of that report.

MR. WOLVERTON. I am sorry but I do not have it.

MR. BULWINKLE. I will let you have mine if you want it.

MR. WOLVERTON. You do not think that it is of any value then.

MR. BULWINKLE. I have read it; but I will let you have mine.

MR. WOLVERTON. My mind is not made up. I will be pleased to read it for the information it contains.

MR. DEVANE. There will be in the course of the next few weeks a supplement to that report as the report states.

Now having attempted to show this committee the plan of this with reference to the regulation of rates and how it seeks to in the State commissions the power to regulate the retail rates through some Federal agency assist State commissions making available to them proper data for the determination of those rates I would like to now pass to a consideration of the integrated system I think we can take judicial notice of the fact that these competitors have now passed beyond State lines and are engaging in interstate commerce to such an extent that Federal regulation in this respect has become necessary.

I would like to call your attention to what we propose an– –tion – –

MR. HOLMES. May I ask one question before you pass on to that.

MR. DEVANE. Yes, sir.

MR. HOLMES. Of what value is this going to be to the State commissions, if you are through this bill not only trying to keep – of the transmission in interstate or foreign commerce, but you are also seeking to control the production and distribution of that energy?

MR. DEVANE. Well, that—

MR. HOLMES. Now, if you take over the production and distribution of that energy, what value is this going to be so far as the commissions are concerned, because then you have absolute power.

MR. DEVANE. I do not think that is the case. The purpose of the bill is to make energy available for local distribution that is efficient and most economical. That is what we attempt to accomplish by this bill to make an abundance of economical power available for local distribution and when that is accomplished, and the necessary information is given State commissions to enable them establish proper rates, then the problem of regulation should – so hard and we should no longer have the feeling that is abroad – that the rates of this industry are too high.

(521) MR. HOLMES. Does not section 208 give you that authority over State commissions?

MR. DEVANE. No authority over State commissions, sir.

MR. HOLMES. Where you control the production and distribution system or facilities that are engaged in interstate or foreign commerce?

MR. DEVANE. Yes; we have jurisdiction over certain facilities. That is the question I am coming to right now.

MR. HOLMES. Well, that may clear up my point. I will be glad to hear you.

MR. DEVANE. Mr. Ryan calls my attention to the fact that you used the word "distribution", and I fell right in with your words in the discussion. Let me correct that, because we do not have any jurisdiction over distribution facilities, but I will clear that up in considering the section covering that subject.

MR. HOLMES. That is my understanding that you are trying here to control not only distribution or the sale of energy through interstate and foreign commerce, but also the distribution and facilities of manufacture.

MR. DEVANE. No; we do not. I want to make that clear; we do not, no, sir.

I call your attention to sections 202 and 203.

MR. MONAGHAN. Before you go on, I want to say that I do not regard my question of yesterday as having been answered.

I am of the opinion that electric energy, when it once starts to cross State lines, the electric line being the carrier, that that energy interstate commerce.

MR. DEVANE. That is right.

MR. MONAGHAN. Interstate electrical energy.

MR. DEVANE. That is right.

MR. MONAGHAN. And that the power is vested in this Congress to regulate that interstate electric energy.

MR. DEVANE. There is no doubt about that.

MR. MONAGHAN. But, I believe—I may be wrong in assuming it—but, I believe that this amendment which you offered yesterday on page 103 of the bill would destroy the effect of this legislation as to the consuming public.

MR. DEVANE. It does not.

MR. MONAGHAN. In other words, if you regulate merely as to a wholesale dealer in electricity, then control over retail rates will only be left to weak-kneed State commissions which are controlled in so many instances by the power companies.

MR. DEVANE. This bill does not undertake to regulate the price –nd in retail distribution. I have stated to the committee—

MR. MONAGHAN (interposing). Of interstate electricity.

MR. DEVANE. Yes, sir. I have stated to the committee several times that those rates, even where the energy is transported in interstate commerce, that comes within the *Pennsylvania Gas Co. case* decision, are still left with State commissions.

Now, the *Pennsylvania Gas Co. case* was a case where the energy was produced entirely in one State and distributed entirely in another State and there the State commission attempted—it was produced in Pennsylvania and sold in Jamestown, N.Y.—and there the New York commission established those rates. The company took the position that was regulation of interstate commerce which the State commission could not do.

(522) The Supreme Court said it is true it is interstate commerce but Congress not having acted upon that particular matter, the local distribution and sale of that energy is of such a local character, the State commission could fix that rate until Congress acted and that is still left the law by this bill.

MR. MONAGHAN. That is, you are wanting to have the Supreme Court legislate that matter, in other words?

MR. DEVANE. No, sir; we are not.

MR. MONAGHAN. In other words, destroy and nullify the power of the Congress to regulate interstate electric energy.

MR. DEVANE. We are proposing something that you, as a Member of Congress, may not be willing to do; that is, we are still leaving that energy subject to State regulation.

MR. MONAGHAN. Then, the question might properly be raised that that is interstate electric energy—

MR. DEVANE. It is. It was so held in the Pennsylvania Gas Co. case.

MR. MONAGHAN. Yes. There is no question about it.

MR. DEVANE. Yes; it is.

MR. MONAGHAN. And the Supreme Court said because Congress has not seen fit to regulate, we will leave it to the State commissions.

MR. DEVANE. Congress can go much further insofar as rate regulation is concerned than we propose to go in this bill, if that is what you mean.

MR. MONAGHAN. I am interested in this bill as it affects the consumer, the rates of the people every time they turn on a vacuum cleaner, or electric light bulb, or use it for the various things, such as refrigerators, and all of the various electrical equipment that we know are used by the consuming public of today, and in seeing that they will not be charged excessive rates.

Now, I can see that this amendment would destroy the effect of the bill insofar as that particular thing is concerned, or the regulation of the rate to the consuming public.

MR. DEVANE. That is right.

MR. MONAGHAN. It would regulate utilities only as to the wholesale dealer, but it would not regulate them as to retail to the person who buys the electric energy.

MR. DEVANE. We do not, by this bill, confer any jurisdiction upon the Federal Power Commission to fix the local rates. That is correct, sir. That authority is not given by this bill. If that is the wish of Congress—

MR. MONAGHAN. This amendment specifically would deny the power to regulate retail rules, would it not?

MR. DEVANE. Yes. This commission has only the power that Congress delegates to it; this bill does not delegate that power to it; and this bill states that it is not the intention of Congress to delegate that power to the Commission; that is right. Congress in this bill makes the declaration that it does not intend by this legislation to confer that jurisdiction upon the Federal Power Commission. And Congress says further in this bill:

We are going to leave that with the State commissions, but we are going to help the State commissions accomplish the kind of regulation that the people of this county are entitled to.

(523) MR. MONAGHAN. But, the State commissions, as I see it, under a strict interpretation of interstate electric energy, would have no power to regulate that, and if not defined specifically in

this bill and properly relegated to the Commission a proper control over that interstate electric energy is virtually destroyed.

MR. DEVANE. My answer to that is that the bill as it is drawn today follows the decisions of the Supreme Court up to this time. If after this bill becomes the law, the Supreme Court should ever decide that there is any part of this industry that has not been subjected to Federal jurisdiction, and cannot be regulated by the States because of its interstate character, then I think the Congress should confer that additional power upon this Commission.

MR. MONAGHAN. In other words, you are writing the Supreme Court's decision into this bill in order to prevent that, in effect.

MR. DEVANE. Yes, sir; we are writing the Supreme Court decisions in this bill. That is correct.

MR. MONAGHAN. But, the Supreme Court said in that case that the reason it believed that it should uphold the act of the State commission of New York was because the Congress had not seen fit to act.

MR. DEVANE. That is right.

MR. MONAGHAN. And here you are saying that Congress should not see fit to act.

MR. DEVANE. That is right, we are here saying that we should not step in, that Congress will not usurp that particular power but leave it with the States.

MR. WOLVERTON. My friend's questions indicate that the amendment that you suggested yesterday was to change the meaning of the bill as it was introduced; but as I understood it was only to make clear what was your contention.

MR. DEVANE. That is correct.

MR. WOLVERTON. So, in other words, your amendment was not introduced to change the policy which you thought the bill had completely set forth, but merely to make the policy clear.

MR. DEVANE. To make the policy definite and so that there would be no question about it. There have been a number of questions asked which indicate that some members of the

committee think the language in this bill goes entirely too far, and we want to make it clear as to the purpose of this bill.

MR. WOLVERTON. Maybe if that amendment has the effect Mr. Monaghan thinks it has, it may get Presidential approval as not being too drastic.

MR. DEVANE. May I pass on?

The CHAIRMAN. Mr. Kenney desires to ask a question.

MR. KENNEY. Can you give us your definition of "regulation"? I am interested to know whether it includes elimination.

MR. DEVANE. No, sir; my definition of regulation would not include elimination.

MR. KENNEY. And in this title II, is there any power given the Commission to eliminate any existing conditions?

MR. DEVANE. Conditions?

MR. KENNEY. Yes

MR. DEVANE. Well there is power to eliminate existing conditions if I understand your question—

(524) MR. KENNEY. Well, is the power given to eliminate any present lines transmitting electrical energy?

MR. DEVANE. Well, no; the power is not given to eliminate any present lines. That may be accomplished in other ways, but the power to eliminate present lines is not given.

MR. KENNEY. How would you accomplish that?

MR. DEVANE. It may be accomplished this way if present facilities are entirely inadequate to properly serve the public convenience and necessity, additional facility may be required which will in fact supersede the present facility, and in that way, the present facility would be eliminated.

MR. KENNEY. Would that drive out of business some existing companies that might be interested in that line?

MR. DEVANE. No, sir; all questions of the kind you are asking should presuppose that anything the Commission does is in the public interest and is right and if it is in the public interest and is right, it should be done—that is, insofar as facilities are concerned—the construction of new facilities, elimination of

present facilities, or the extension of facilities. It must always be assumed that the thing that the Commission orders done is in the public interest or it has no right to order it done. If it is not in the public interest then the company against whom the order is issued has its resort to the court to prevent it. The approach to the power given the Commission under this bill with reference to the extension of facilities or with reference to any other matter must be predicated upon the assumption that all such powers will be exercised in the public interest.

MR. KENNEY. And, we have to assume that the Commission is always right in that regard?

MR. DEVANE. No, sir; you do not have to assume that.

MR. KENNEY. I so inferred from what you said.

MR. DEVANE. You mean up to the point where the Commission has passed upon it?

MR. KENNEY. Yes. And for review by the courts of the decision of the Commission, would certiorari be required in order to bring up all of the facts to have the court pass on them?

MR. DEVANE. No, sir; the act provides for a direct appeal to the circuit courts of appeal in the several circuits in the United States, in the circuit where the controversy arises.

MR. KENNEY. And the appeal would permit a review of factual questions by the court?

MR. DEVANE. It goes up on the record that was made before the Commission, with the proviso that if the utility needs some additional evidence that it could not present at the hearing before the Commission, it may petition the court and present it.

The CHAIRMAN. It is the usual procedure, is it not?

MR. DEVANE. Yes, sir.

Mr. CROSSER. Mr. Chairman—

The CHAIRMAN. Mr. Crosser.

MR. CROSSER. Mr. DeVane, just before passing on, may I ask just one question, as to whether it is your's or the Commission's idea in limiting the power to regulate merely to wholesale disposition of power rather than wholesale and retail, so as to

avoid controversies or do you think this is sound political economy?

(525) MR. DEVANE. I think it is sound economy. I think this bill offers, if I may be permitted to say so with some modesty, that this bill offers a plan of regulation that fits into our system of government as well as, and I would like to say, better than, either the Interstate Commerce Act or the Communications Act, in that it establishes more cooperation between the States and the National Government. It permits them to function in unison. The Communications Act went a long way in that regard, but this bill goes even further.

MR. MONAGHAN. Mr. DeVane, you say in effect that you are leaving the regulation of interstate electric energy to the State commissions. You are in effect saying they can do a thing, or you are going to help them do a thing, which patently they cannot do.

MR. DEVANE. Well, my answer to that question is this, we are lending the aid of the Federal Government to them to see if this kind of regulation cannot be accomplished in this way.

Now, if this is a failure, or if this industry is able to defeat proper and adequate regulation under this law, and the States are not able to function, then I think Congress must take the second step; but let us do not take it until we have given this matter a trial.

MR. MONAGHAN. If I can make myself clear on that point—

MR. MERRITT. You do not want to abolish the States unless we have to.

MR. MONAGHAN (continuing). I am trying to argue to this situation: Here is an electric energy that emanates from the State of Connecticut, we will say, or Montana. Take whatever State you wish. And, it is distributed in the State, we will say, taking Montana as the example, it is distributed in the state of Wyoming. That is clearly interstate electric energy. As such, the Congress and the Congress alone has the power to regulate it; but the effect of what you are saying here is that the States have the power and we will just cooperate with the States.

MR. DEVANE. Yes

MR. MONAGHAN. And, I cannot see but that is just passing the buck, and not standing right up under the guns here and saying Congress will do the thing which it should do, regulate those rates in the interest of the public, and I think this amendment has that effect.

MR. DEVANE. If you do not make the purpose clear you would reach out and control that energy.

MR. LEA. Mr. Chairman— . . . .

The CHAIRMAN. Mr. Lea.

MR. LEA. In section 217 of this bill it is provided that:

Nothing in this bill shall be construed to impair or diminish the powers of the State commission.

Now, from what you have said I take it that you construe those powers of the State commissions as including the powers they now exercise because the Federal Government is not occupying the field; is that true?

MR. DEVANE. Yes; that is true. Let me make this clear to you, if this bill provided for the regulation of all energy in interstate commerce but nevertheless contained that provision in it, I do not think that provision in and of itself would override the other provisions and leave the power in State commissions that they now have under (526) the Pennsylvania Gas Co. decision; if I may make that point to you.

Mr. LEA. Well, I take it that the power of the State commissions if we permit this language to remain, would include not only the power that the State commissions are now exercising, but the powers that they could exercise at the present time in the absence of Federal control.

MR. DEVANE. If this act attempted to exercise all of the power that Congress has then that provision would be construed in that light and it would mean that Congress had taken from the States all the power they now have except that reserved to them under the Constitution.

On the other hand, if you come along and say as you do in this bill that there is a certain class of this business that you do

have jurisdiction over, but assert that you are not going to take jurisdiction of it, but are going to leave it with the States the effect is to leave that energy subject to State regulation even though it is energy over which you might assert jurisdiction.

MR. LEA. Does not that delegate to the States a function that is really a Federal function?

MR. DEVANE. Yes, sir.

MR. LEA. Is there any other instance in which the Federal Government has provided for regulation in which it has adopted this language as is contained in section 217 preventing the impairment of diminishing of a State power?

MR. DEVANE. The language of section 217 is the exact language of the Communications Act, section 213 (h).

MR. LEA. There is no regulatory measure adopted prior to that time that contains that language?

MR. DEVANE. I do not recall any, Mr. Lea; no, sir.

MR. LEA. Well, in the provision that you cited a while ago, giving the Power Commission authority to make the investigation as to costs and so forth, and authorizing them to keep the information current, would not that require constant attention to that job and virtually make the Federal Government subordinate to the State commissions, leaving the Federal Commission at the beck and call of the State commissions to perform that constant valuation service?

MR. DEVANE. It is not a valuation service, Mr. Lea. The – under that provision is simply this: I think it is a fact about which we may take judicial notice, that we do not have in this country information as to the actual cost of the property that is devoted to this service. We have book records, but we do not have costs.

Under the provisions of this bill the Commission would undertake to ascertain how much money there is invested in the interstate property of these utilities, how much it cost to construct the property. Having ascertained that, then the accumulations of your additions annually each year thereafter is a very simple matter. All that information will be made available

to the State commissions. They will know this year, the next year, and the next, what this property actually cost.

MR. LEA. Would that be with the idea of affording the State commissions ample information upon which to base rates?

MR. DEVANE. Yes, sir.

MR. LEA. Would not that be similar to the valuation we authorize with regard to the railroads which required 8 or 10 years and then was not complete?

(527) MR. DEVANE. No, sir. The difficulty that the Interstate Commerce Commission ran into under that act was in determining the reproduction cost new, and the reproduction cost new, less depreciation. That was because they had to make inventories of the property, and had to make appraisals. The determination of a historical cost is nothing like the task of determining the reproduction cost new less depreciation, provided you have records that are any good at all.

Now, if these companies have no records, if they can show that they have no records that are any good at all, then it will be a substantial job, but even then nothing like the job of the Interstate Commerce Commission.

MR. LEA. It would require the constant ascertainment of values, would it not?

MR. DEVANE. No, sir. And, so far as the future is concerned, the determination of cost will be a simple matter because it will be set up on their books under accounting regulations prescribed by the Commission which they must follow.

MR. LEA. Is there anything in this bill that would provide for the joint determination of values or rates, by the Federal and the State governments?

MR. DEVANE. Yes, sir; in 214, the cooperative section.

MR. MARTIN. May I ask a question?

The CHAIRMAN. Mr. Martin.

Mr. MARTIN. Does not the situation in the power field call for the exercise by Congress in this legislation of all of the power that it has to regulate under the Constitution and under the commerce clause?

MR. DEVANE. Speaking as an individual, and expressing an individual opinion in answer to that question, I will say that it is my opinion that this bill will accomplish everything that Congress wishes in connection with the regulation of this industry.

MR. MARTIN. Assuming that your answer had been in the affirmative, I propose then to follow it by the further question as to whether section 217 could not be dropped from the bill and leave it to the courts to determine whether the Federal Power Commission in any given case exceeded its authority and invaded the constitutional right of the State?

MR. DEVANE. Yes; the legislation could be drawn along that line.

MR. MARTIN. The legislation could be drawn with the express policy of taking into the control of the Federal Government all the power that it has for the regulation of this industry without putting that expression in the bill contained in 217; it could be just dropped out.

MR. DEVANE. Section 217 could be dropped out, yes, sir; but I would like to see section 217 preserved as a matter of congressional policy.

MR. MARTIN. It just seems to me that in 217 the Commission is standing up so straight that it is leaning backward.

MR. DEVANE. I do not so interpret it.

Mr. PETTENGILL. Well, Mr. DeVane, you have stated that in the drafting of this title II, you conferred with the different State commissions; did you not?

MR. DEVANE. Mr. Seavey stated that.

MR. PETTENGILL. That is the fact; is it not?

(528) MR. DEVANE. Yes, sir: that is the fact.

MR. PETTENGILL. Well, was section 217 put in in order to obtain their consent to the bill?

MR. DEVANE. No, sir.

MR. PETTENGILL. It was done entirely voluntarily on your part?

MR. DEVANE. Yes, sir.

MR. BULWINKLE. How many State commissions have complained to the Federal Power Commission of their lack of authority to handle this power question?

MR. DEVANE. None that I know of. There is no reason why they should.

MR. BULWINKLE. Not a one?

MR. DEVANE. No, sir.

MR. BULWINKLE. How many consumers, if any, have applied to the Federal Power Commission, or complained to the Federal Power Commission on account of the wholesale rates in interstate commerce being too high?

MR. DEVANE. The consumers.

MR. BULWINKLE. Yes.

MR. DEVANE. Now, you mean the wholesale consumers.

MR. BULWINKLE. The wholesale consumers.

MR. DEVANE. I cannot answer that question.

MR. BULWINKLE. Have there been any?

MR. DEVANE. I cannot answer that question. We have had thousands of complaints. As to how many of them are wholesale or retail, I do not know.

MR. BULWINKLE. As to how many are wholesale or retail, you do not know?

MR. DEVANE. No.

MR. BULWINKLE. But, there has not been a single State commission that has made any complaint to you at any time or any statement to you at any time asking for Federal regulation prior to the enactment or rather the drafting of this bill?

MR. DEVANE. Now than, as I understand you, if I understand the character of your question, you mean—

MR. BULWINKLE. How many have complained?

MR. DEVANE. The State commissions, the State commissioners that considered this bill endorsed it and—

MR. BULWINKLE (interposing). But, I understood from Mr. Seavey when he was on the stand that title II was not in the bill when they endorsed it.

MR. DEVANE. Oh, it was; title II of title II.

MR. BULWINKLE. Was that all of the State commissions?

MR. DEVANE. It was taken up through their national association here in Washington.

MR. BULWINKLE. Who represents them here?

MR. DEVANE. The executive committee and the legislative committee of the national association. Mr. Benton, who is their Washington representative, will appear here as a witness and he can furnish the names of the men that are on the executive committee and the names of the men that are on the legislative committee; but it was taken up and the committees were called in session.

I believe Mr. Seavey offered the resolution of the executive committee with reference to this bill.

(529) MR. BULWINKLE. But, prior to that time—I want to get it straight—prior to that time, not a single State commission had complained to the Federal Power Commission about their lack of authority to handle this situation.

MR. DEVANE. Well, that is little too broad an order for me, because I do not know whether they had or not. I could not answer that question.

MR. BULWINKLE. You have not heard of any?

MR. DEVANE. I have not heard of any.

The Chairman of the Commission, Mr. McNinch, calls my attention to the fact that you will find in many of the annual reports of the State commissions, statements to the effect that Federal legislation should be enacted to control holding companies and interstate wholesale contracts.

MR. BULWINKLE. You do not know which States though; where that is?

MR. DEVANE. No, sir; I have not examined those reports.

The CHAIRMAN. They all know that they did not have any power to do it.

MR. DEVANE. Yes, sir.

MR. BULWINKLE. That might be some of those 12 that do not have any State powers to do it.

The CHAIRMAN. I think their resolution stated in endorsing this bill that they say that they think it is necessary in order to bring about effective State regulation that there be Federal regulation over these matters that they cannot reach by State authority.

MR. BULWINKLE. The reason I asked, Mr. DeVane, I notice in the papers that the Georgia Utilities Commission announced that they were coming to Washington to fight this bill.

The CHAIRMAN. Yes; on the theory that it was taking away from them some of their jurisdiction; not on any other theory, because I think I have talked with practically every Congressman from Georgia or every one of them has talked to me about it, and upon being assured that this bill did not take jurisdiction away from their commission, they seemed to be perfectly satisfied.

MR. DEVANE. Due to the error that occurred in subsection 201 (a) there was plenty of justification for the effort that has been made to convince State commissions that it was the purpose of this bill to take power away from them, and that representation could be fairly made to them, and since the bill has been introduced, I have heard it stated that was the concealed purpose of this commission, and probably might be the intention of Congress; but I want to make it perfectly clear here that it is not the purpose or desire of the Commission, and we trust that when the legislation comes out of Congress that it will leave to the State commissions as much authority as can be left with them.

The CHAIRMAN. And you want the act to be perfectly clear on that point.

MR. DEVANE. I want the act to be perfectly clear on that point.

MR. BULWINKLE. The reason I asked you was I notice in my mail from 150 to 200 letters a day and there has never been one from the State commission asking me to support it.

MR. COLE. Mr. Chairman, may I ask a question?

(530) The CHAIRMAN. Mr. Cole.

MR. COLE. Following the line of questions for the last 3 or 4 minutes, regardless of whether the State commissions have complained or not, it is a fact that it is terrifically expensive and burdensome on the State commissions to attempt to determine whether the cost of power coming into the State through interstate commerce for local distributing companies is fair or not.

MR. DEVANE. Yes.

MR. COLE. All I understand this legislation to do is to establish fair, reasonable and just costs.

If the power at the State line and from that point on through the distributing plant of the local distributing company, to the consumers is under regulations of the State law.

MR. DEVANE. Yes, with one exception, Mr. Cole, we would include in our costs, in our determination of what was a reasonable cost of that power, the cost of transmission to the point of local distribution.

MR. COLE. Oh, yes, I understand that.

MR. DEVANE. Beyond the State line to the point of the local distribution.

MR. COLE. And to determine that now through the State agencies, State commissions, is an almost impossible task, is it not?

MR. DEVANE. Oh, I think so. I think it would be just like trying to pull a freight car with a team of mules. That is a fair illustration of the difficulty as a State matter.

MR. BULWINKLE. What additional cost will it be, and I am just asking for information, assuming that this act is passed, title II is passed, to the Federal Power Commission for the personnel and all other expenditures necessary for the carrying out of these various investigations, and in enforcing the act?

MR. DEVANE. May I first make this statement: You understand, of course, the administration of the Federal Power Commission throughout its existence has been without any cost to the Government. It is maintained through charges that are imposed upon the licensees.

MR. BULWINKLE. I realize that fact.

MR. DEVANE. So far as I know, no estimate has been made of what it would cost the Government to administer the provisions of this bill, and I would say that no real estimate could be made until Congress passes the law and we know what functions are going to be administered. At that time a proper estimate can be made.

The CHAIRMAN. We will go on this afternoon. There is general debate in the House. So, we will go on this afternoon at 2 o'clock.

MR. DEVANE. We will meet here at 2 o'clock?

The CHAIRMAN. Yes.

(Thereupon, at 11:40 a.m., the committee recessed until 2 p.m. of the same day.)

AFTERNOON SESSION

(The committee reconvened, pursuant to the taking of a recess, at 2 p.m., Hon. Sam Rayburn (chairman) presiding.)

The CHAIRMAN. The committee will come to order.

All right, Mr. DeVane, you may proceed.

* * * * *

(548) jurisdiction over rates is concerned, there is absolutely no encroachment upon State authority. It is my position, insofar as 204 is concerned, there is no encroachment upon State authority. The bill, in section 203 states—

MR. BULWINKLE. Let me ask you right there: Let us suppose that we have a power company in North Carolina, Virginia, or Maryland—I do not care which—and the extension that they are going to make is purely intrastate: while they do a minor amount of interstate business, this extension is purely intrastate.

Now, they have to get a certificate of convenience and necessity from the Commission—from your Commission—to do that?

MR. DEVANE. No, sir.

MR. BULWINKLE. Well, that is an extension.

MR. DEVANE. Yes, sir: that is true. That is an extension, and that illustrates the point that I attempted earnestly to make to you yesterday. In considering the word "extension," or considering any other word in this bill, you must take into consideration the authority that is conferred under section 201.

The bill gives the Commission jurisdiction over the transmission facilities that are used in interstate commerce and the production facilities that are used in connection with those transmission facilities.

The bill does not give the Commission any jurisdiction whatever over facilities used in local distribution or the transmission facilities that are used in connection with such local distribution, unless they are also a part of the facilities that are used in interstate commerce.

MR. BULWINKLE. Then it is your opinion and your construction that if owners of this power company were to build an additional transmission line going into another State, then they would be under your jurisdiction?

MR. DEVANE. That is correct. If it is a transmission line going into another State, it must convey the energy that goes into interstate commerce. Do I make that clear to you?

MR. BULWINKLE. Do you not think that we had better amend that just a little bit, because we may have a judge that has no clearer idea of it than I have.

MR. DEVANE. I hold no brief for the words that are used to accomplish the purposes sought by the bill. I have no doubt but what you will find that there are other words that can express the same intention in language that is more satisfactory to you.

MR. BULWINKLE. Well, let me state this: My understanding of the purpose is that so far as the Federal Power Commission is concerned, I do not mean that they are asking it, but all that is asked for it is that just the power sold in interstate business, wholesale, shall be under the regulation of the Federal Power Commission; is that it?

MR. DEVANE. No, sir; you have changed your question on me again.

MR. BULWINKLE. All right, then let us try it again.

MR. DEVANE. All right.

MR. BULWINKLE. The Federal Power Commission—it is asked that the power be given to the Federal Power Commission to control all companies who are selling power in interstate, the power which is sold in interstate; give them the power to control it; is that right?

MR. DEVANE. No, sir; that is not right.

MR. BULWINKLE. Then, what is it that they are asking?

(549) MR. DEVANE. Well, I should not say it, but you discouraged me. After so many efforts to make it clear I feel that probably someone else could do it better than I can; but let me state it again.

MR. BULWINKLE. All right.

MR. DEVANE. Insofar as rates are concerned–

MR. BULWINKLE. Wait a minute. Maybe we can get what is the main objective point to title II.

MR. DEVANE. Yes; Federal and State cooperation and interconnections are the main advantages, throughout this bill.

MR. BULWINKLE. I am not talking about advantages.

What are the great objectives sought by the passage of title II of this bill?

MR. DEVANE. Two objectives are sought by the passage of this bill.

MR. BULWINKLE. Let us get those.

MR. DEVANE. One objective is complement to State regulation of rates. The second objective is regional coordination and the bringing of these properties together in systems in these regions. Those are the two main objectives of this bill.

MR. BULWINKLE. Well, then, the other thing is not considered at all—the wholesale—the right of the Federal Power Commission to regulate the wholesale price of the transmission?

MR. DEVANE. That is a part of the first objective of the bill.

The first objective of the bill is a complement to State regulation of rates, and as a part of that complement the bill provides that the Federal Power Commission may regulate the rates that no State commission can regulate. The bill simply fills this gap and that is all.

MR. BULWINKLE. And that is all that you are asking?

MR. DEVANE. That is all, insofar as the rates are concerned.

MR. BULWINKLE. All right.

MR. DEVANE. Now, when you are talking about rates, that is all; we simply fill the gap. I want that clearly understood, that that is all insofar as rates are concerned.

The second objection is the creation of regional integrated systems so as to secure the best service to the public.

MR. BULWINKLE. Well, then, the question comes to my mind, has the public not been served?

MR. DEVANE. Oh, the public has been served, but do you mean, has it been served to the best advantage?

MR. BULWINKLE. To the best advantage.

MR. DEVANE. No.

MR. BULWINKLE. In what respect; have their rates been too high?

MR. DEVANE. I think so. I think you have a fairly good answer to that in what has happened in the last 18 months. I think there has been a reduction in rates in the last 18 months amounting to an annual reduction of between 35 and 40 million dollars. To a very large degree these reductions have been voluntary on the part of the industry. I think that is a fairly good answer to your question.

MR. PETTENGILL. Mr. DeVane, I would like to ask your construction of the word "operate" in line 4, page 107.

Now, that reads:

No public utility shall undertake the construction of extension of any facilities subject to the jurisdiction of the Commission or acquire or operate any such facilities.—

Without getting a certificate of public convenience.

(550) Would that apply to facilities already existing?

MR. DEVANE. Will it apply to existing facilities?

MR. PETTENGILL. Yes; the word "operate."

MR. DEVANE. Your reference to the word "operate" goes along with the word "acquire". That is, it relates to facilities not previously owned or controlled.

MR. PETTENGILL. Well, it is not your intention to require a certificate of public convenience from existing companies to operate their existing facilities?

MR. DEVANE. No; not at all; not at all, sir. That wording is not intended to require that, and if there is any need for clarification of that, I ask that it be done, because it only applies to those facilities that might be acquired.

MR. COOPER. Mr. DeVane, may I ask you a question?

MR. DEVANE. Yes, sir.

MR. COOPER. I believe you stated a moment ago that this bill gives to the Federal Power Commission power to regulate electric energy transmitted in interstate commerce for wholesale purposes, and the production facilities?

MR. DEVANE. And the transmission facilities used in transmitting the energy.

MR. COOPER. You said production.

MR. DEVANE. Production and transmission; yes, sir.

MR. COOPER. All right now. Supposing here was an industry, 10 percent of whose business was interstate, and 90 percent was intrastate; the 10 percent interstate still gives you the power to regulate it, notwithstanding that 90 percent is intrastate, you can regulate the industry?

MR. DEVANE. It gives the Commission control over interstate transmission facilities.

MR. COOPER. And you said production.

MR. DEVANE. Coming into that, it gives the Commission jurisdiction over production facilities connected with the interstate transmission facilities.

In that respect, may I say Mr. Cooper, that it is in entire accord with every other piece of regulatory legislation Congress ever passed.

MR. COOPER. Let us understand this right now; not withstanding 90 percent of the business is intrastate and 10 percent is interstate, this bill gives you the power to regulate the entire production of the industry?

MR. DEVANE. Yes, sir.

Less than 5 percent of the telephone industry is interstate.

MR. WOLVERTON. Mr. DeVane, you spoke of the use of the word "operate" as probably being ambiguous.

I want to say it has been my experience on this committee with any bill drawn by Mr. Cohen, and Mr. Cochran, that there is nothing ambiguous in it. It is always fraught with meaning, and I cannot discount the power that seems to exist as the result of the use of language by saying it is ambiguous. I have found by experience that if they have drawn a bill that they are so careful and are so choice in the language that they use that they could give a reason for that particular wording, and it is always filled with meaning.

MR. DEVANE. Of course, I have no answer to that.

(551) MR. WOLVERTON. It might be assuring to this committee to be told that some of the words are ambiguous, but from the experience I have had in the past that would not assure me, for I have a feeling that word is there for some purpose.

Now, if you had drawn the bill and you would acknowledge that you had used ambiguous language, I would have the utmost confidence in leaving it up to you to correct that particular language; but when you suggest that their language is ambiguous, I am afraid that you have not had the experience with them that we have had.

MR. DEVANE. Do I understand from that statement, that it is your impression they drew title II of title II?

MR. WOLVERTON. We had a witness here before us who said they did.

MR. DEVANE. No, sir.

The CHAIRMAN. How is that?

MR. WOLVERTON. A witness who said they did.

The CHAIRMAN. Did what?

MR. WOLVERTON. Drew this title.

The CHAIRMAN. What witness said that?

MR. DEVANE. No not title II of title II.

MR. WOLVERTON. His statement was that the same language that appears in title II appears in title I.

MR. DEVANE. I understood that testimony related to title I only.

MR. WOLVERTON. It has already been pointed out to us that the same words are in title I and title II.

MR. DEVANE. That was in connection with sections 15 and 16.

MR. WOLVERTON. Whether those who drew title II adopted the language Mr. Cohen and Mr. Cochran used in title I or whether they adopted the language you folks used in title II, I do not know, but the fact is that the same language exists in both.

MR. DEVANE. I do not contend that anyone who had anything to do with the preparation of title II of this bill is any more qualified, or as much qualified, as Mr. Cohen or Mr. Cochran, to draft legislation. It is my understanding that they are men of great ability and are very highly regarded in that respect, and I wish I had the ability that they have. I would be very proud of it. But, I do want to say in connection with any of the statements that I have made with reference to any language used in title II of title II, that what I have said to this committee as to the purpose of this legislation, and as to the desire of the Federal Power Commission, presents the purpose and the desire of the Commission and that there is no desire whatever to obtain results through this legislation that I have not stated.

We are not using words that are ambiguous with the intention or in the hope of getting a different result when the legislation is passed. We are perfectly sincere in our efforts to accomplish

a certain purpose, and we have used language that we think accomplishes that purpose.

MR. WOLVERTON. There is no thought in what I have said of conveying the impression that I do not consider that you are perfectly honest and sincere certainly in the views that you have expressed, nor is there any intention upon my part in any way to speak detrimentally of the ability of those two gentlemen, for I have even higher respect for their ability than you have expressed that you

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APPENDIX M

Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce House of Representatives 80th Congress, 1st Session, (1947), excerpts from Testimony of Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission

M-1

FEDERAL POWER ACT

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

EIGHTIETH CONGRESS

FIRST SESSION

ON

H.R. 2972

A BILL TO AMEND SECTION 201

OF THE FEDERAL POWER ACT

AND

H.R. 2973

A BILL TO AMEND

THE FEDERAL POWER ACT

JUNE 23, 24, 26, JULY 2, 10 AND 11, 1947

Printed for the use of the
Committee on Interstate and Foreign Commerce

(505)STATEMENT OF HOWARD E. WAHRENBROCK, ASSISTANT GENERAL COUNSEL, FEDERAL POWER COMMISSION, WASHINGTON, D.C.

Mr. HALL. Mr. Wahrenbrock, will you state your full name and the office which you hold?

Mr. WAHRENBROCK. My name is Howard E. Wahrenbrock. I am an assistant general counsel of the Federal Power Commission.

As has been indicated, I shall discuss the legal and jurisdictional phases of the Commission's views with respect to H. R. 2972—the nature and effect of the bill on the scope of regulation of interstate electric utilities under part 14 of the Federal Power Act—and explain the reasons which impelled the Commission to say in its report that H. R. 2972 must be viewed as a virtual repeal of that regulation.

Superficially, H. R. 2972 may seem to be just a series of provisos or exemptions of a few facilities, persons, and transactions from the provisions of section 201, in part II, of the act. But that section is one which defines the facilities, persons, and transactions which are brought within the Federal regulation provided by most of the other sections of part II of the act and the related provisions of part III. The effect of the exemptions is to generally withdraw from the application of the act the bulk of the facilities, persons, and transactions now regulated. Their importance can be fully appreciated only by understanding what Congress sought to accomplish by the Federal Power Act as it now stands. This is important whether those purposes are now to be adhered to, or are to be changed by Congress, for only by consistently following clearly understood purposes can the provisions relating to jurisdiction be so amended as to remain workable and be truly indicative of the intent of Congress.

PURPOSES OF PART II OF FEDERAL POWER ACT

The history of part II and the related provisions of part III of the Federal Power Act discloses that they had two principal purposes. (506) One was to regulate interstate wholesale rates and service of electric utilities which the Supreme Court under the commerce clause had held to be beyond the reach of the constitutional power of the States. The other was to strengthen and supplement State action which had been ineffective in correcting and preventing the unsound corporate and financial practices disclosed by the Federal Trade Commission's comprehensive investigation of the utility industry. A brief explanation of each of these purposes will make clear that the exemptions proposed in H. R. 2972 do not merely remove a few fringe companies from the coverage of the Federal Power Act, but substantially defeat the purposes for which it was enacted by exempting a large and important part of the industry.

1. *Regulation of interstate wholesale rates and service*

Supreme Court decisions under the commerce clause over a period of more than 15 years preceding the Federal Power Act had demonstrated that the States were constitutionally powerless to regulate the transmission or sale at wholesale in interstate commerce of electric energy or gas (*Public Utilities Commission v. Landon,* 249, U.S. 236 (1919); *Missouri v. Kansas Natural Gas Co.,* 265 U.S. 298 (1924); *Public Utilities Commission v. Attleboro Steam & Electric Co.,* 273 U. S. 83 (1927): *State Corporation Commission v. Wichita Gas Co.,* 290 U. S. 561 (1934)).

In *Missouri v. Kansas Natural Gas Co.,* the company produced and purchased gas, in Oklahoma and Kansas, and piped it into Kansas and Missouri, selling it to local distributing companies situated in the latter States. The company contended that the State commissions could not, as they had attempted,

constitutionally regulate the rates of the wholesale sales to the local distributing companies. As foreshadowed in the *Landon case, supra,* this contention was upheld. The Court made it clear that even in the absence of any action by Congress, the commerce clause, of its own force, restrains the States from assuming jurisdiction over wholesale sales in interstate commerce.

The Attleboro case appeal the — Court holding that it was beyond the power of the individual States to regulate the transmission and sale of electricity generated in one State and sold to an out-of-State purchasing company for consumption in another State. The Court made it clear that the particular point at which title passed was immaterial. Indeed, although the sale there involved took place at the State boundary, the Court relied upon a case which had held that sales in interstate commerce made in the State of origin were beyond the power of the several States to regulate, citing *Shafer v. Farmers Grain Co.* (268 U. S. 189), and upon *Missouri v. Kansas Natural Gas Co.(supra),* where the sales were made in the State to which the gas had been transported and in which the sales had taken place, so that the Court's reliance on that case emphasizes that it is inmaterial where the sale takes place.

These cases make it clear that at the time of the passage of the Federal Power Act of 1935, the individual States lacked the constitutional power to regulate the interstate transmission, and the sale at wholesale in interstate commerce of electric energy generated in one State and transmitted for consumption in another, whether the sale occurred in the State of origin, at the State line, or in the State of destination.

(507) They illustrate the wide scope of the "gap" in regulation which existed at that time. Transportation, sale, and delivery to the distributor as an unbroken chain, fundamentally interstate is beyond the regulatory powers of the States. This is the law

today, some of these cases having been cited with approval by the Supreme Court in the present term.

However, the decisions of the Supreme Court had also pretty clearly indicated the boundaries of the area in which the States were powerless, by upholding the authority of the States to regulate rates and service in local distribution of gas and electric energy although moving in a continuous, uninterrupted interstate flow to the consumer *(Pennsylvania Gas Co. v. Public Service Commission,* 252 U. S. 23; Cf. *South Carolina Power Co. v. South Carolina Tax Commission,* 52 F. (2d) 515 affirmed *per curiam,* 286 U. S. 525). Related tax cases indicated that generation of energy was within State competence, even though the energy was transmitted in interstate commerce after leaving the generator *(Utah Power & Light Company v. Pfost,* 286 U. S. 165). This was also true of interstate transmission for the transmitter's own consumption *(The Pipe Line Cases,* 234 U. S. 548).

Congress sought to plug the constitutional gap in the powers of the States by the provisions of the Federal Power Act relating to the regulation of rates and service in interstate transmission and sale at wholesale. In particular these are section 202 (b), 205, 206(a), and 207. The definitions in that act of the Commission's jurisdiction over rates and service were drawn with care to assure that the statutory plug should exactly fit the constitutional gap. The public utilities regulated by the act were defined as those persons owning or operating facilities for transmission or sale at wholesale of electric energy in interstate commerce (sec. 201). To prevent encroachment upon the powers of the States, express limitations were spelled out in section 201 (b) against any Federal assertion of jurisdiction over facilities for generation, facilities used in local distribution, facilities used only for intrastate transmission and facilities for transmission of electric energy consumed wholly by the transmitter. These provisions effectuate the declaration of policy in section 201 (a),

"such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States," as Mr. Justice Jackson pointed out in *Connecticut Light & Power Co. v. Federal Power Commission* (324 U. S. 515, at p. 527).

The enactment of Federal legislation for this purpose was not opposed, and moreover was actually sought and recommended by State regulatory agencies and their representatives. And I may point out that the former general solicitor of the National Association of Railroads and Utilities Commissioners has recently written:

This power of rate regulation, in practice thus far, has resulted in no encroachment upon the rate-making power of State regulatory agencies (Benton, John E., *Jurisdiction of the Federal Power Commission and State Agencies,* 14 Geo. Washington L. R. 53, 65-66).

2. Correction and prevention of corporate and financial abuses

At the time the State commissions were seeking Federal legislation to fill the constitutional gap in their regulation of rates and service, Congress also had before it the shocking indictment presented by the Federal Trade Commission's disclosure of the financial and corporate (508) abuses which had become prevalent in the gas and electric utility industries in spite of long attempts by the State, to regulate those industries. The electric utility industry had been subject to public regulation almost from its inception a little before 1890. Electric utilities had to have the use of public streets and highways to serve their customers. The use which could be made of streets and highways for electric service facilities naturally was limited. Practical and esthetic considerations as well as obvious considerations of economy limited the number of companies which might be permitted to use them in competing to serve customers in the same area. The protected market and practical

monopoly thus assured to the companies obtaining franchises carried obligations of public service like those of common carriers, to serve all customers seeking service, and to do so at reasonable rates sometimes prescribed by franchise or action of public authority. Other special privileges were conferred on the companies, including the sovereign power of eminent domain.

At first this public regulation was usually by the local municipality, largely through the terms of the franchises, but this was supplemented at an early date and followed by State regulation through utility commissions. The powers of such commissions were broadened from time to time and covered security issues, transactions in utility properties, and accounting, as well as rates and service.

The first Federal regulation of electric companies, provided by the Federal Water Power Act of 1920, was merely an incident to the licensing of hydroelectric projects on public lands or involving navigable waters of the United States. Initially it affected only a comparatively few companies.

But the rapid expansion of the industry brought an increasing measure of responsibility to the Federal Government. During the decade from 1910 to 1920, the development of long distance transmission resulted in the interconnection of water power plants with industrial and urban markets. The following decade saw the inter connection of steam generating plants, as well as water power plants and power markets. This marked a long step in the transformation of the electric utility industry from an aggregation of isolated local plants to large interconnected systems covering many States. These technical developments afforded lush opportunities for financial exploitation which reached its climax in 1929.

This expansion of the industry and financial exploitation exceeded the powers of the States to deal with it effectively.

One reason was the constitutional limitations spelled out in the court decisions. Another was the practical handicaps to effective regulation of the industry as operating companies were merged into larger aggregations and the capitalization, securities, and everyday operations and expenditures of operating companies were manipulated in disregard of local interests.

Signs of dangerous concentration of control of the vast utility industry, accompanied by corporate and financial abuses and expenditures of large sums of money to influence legislation and public opinion began to atone congressional suspicions that both consumers and the investing public were being victimized (69 Congressional Record 3022-23) Senator Thomas I. Walsh, of Montana, introduced a resolution authorizing an investigation, and in February of 1928 the (509) resolution was adopted which initiated the Federal Trade Commission's thoroughgoing investigation of the electric and gas utility industry.

Without waiting for the completion of that investigation, President Hoover on December 3, 1929, in his annual message to Congress recommended that a full time Federal Power Commission be created in place of the ex officio Commission composed of Cabinet officers which had originally been set up, and further, that the Commission's jurisdiction be broadened to include regulation of electric rates in interstate commerce where State commissions had no control.

Senator James Conzens, of Michigan, and Congressman James S. Parker, of New York, promptly introduced bills to carry out President Hoover's recommendations (S. 3869 and H. R. 11108, 71st Cong., 2d sess.). These bills were designed to give the Federal Power Commission jurisdiction over rates and charges for power sold in interstate commerce, over transmission of power in interstate commerce, and over other facilities or services furnished in connection with such a sale or transmission.

Congressman Parker, who was then chairman of the House Committee on Interstate and Foreign Commerce took the position in the debates on the bill that it was incumbent upon the Federal Government to regulate the interstate transactions in electric energy unregulated by the States, amounting at that time to 5 percent of the total electric energy used (72 Congressional Record 10333). The year 1930, however, saw only the administrative features of the bills enacted into law, while the enactment of substantive legislation awaited the report of the Federal Trade Commission investigation.

That report when completed in 1935 disclosed many evils which called for correction by legislation aimed at the holding company systems at levels above the operating companies. These disclosures led to the enactment of the Public Utility Holding Company Act of 1935, administered by the Securities and Exchange Commission. That act proceeded upon the principle that Congress has jurisdiction under the commerce clause to regulate the corporate and financial activities of holding company systems, because of the effect of those activities on interstate commerce, and not only interstate commerce in electric energy but also in securities.

But the Federal Trade Commission report also disclosed evils at the operating company level. These practices could be regulated by the Federal Government on clearly established constitutional principles because the bulk of the operating industry was comprised of the larger companies, most of which were engaged in part in interstate commerce. The Federal Trade Commission's report disclosed among other things, as recently summarized by its chairman:

1. That as a result of technological advances there had developed a large and increasing amount of interstate commerce in electric energy;

2. That this had been accompanied by an enormous expansion of interstate commerce in the stocks, bonds, and other securities of companies engaged therein;

3. That huge holding companies had gained and were exploiting their monopolistic control of such commerce carried on by their operating subsidiaries not only in production, transmission and sale of electric current but in the flotation and sales of securities on a wildly speculative basis;

4. That the resulting inflation of the capital structure of the industry had operated to inflate the rate base and the amounts paid by the consuming public for electricity; and

(510) 5. That all these unwholesome developments were beyond the effective reach of regulation by State utility commissions.

Many of the most serious abuses uncovered in the Commission's investigations were practices of misrepresentation and deception in financial matters through unsound accounting methods. This resulted in various forms of overstatement of capital assets, inflation of securities, and misrepresentation of income and surplus. The investigations disclosed large amounts of write up and inflation (Davis, Ewin L., The Influence of the Federal Trade Commission's Investigation on Federal Regulation of Interstate Electric and Gas Utilities, 14 George Washington Law Review 23).

The importance of correcting and preventing recurrence of such abuses at the operating company level is currently increasing as more and more electric utility companies are divested from holding company systems by the Securities and Exchange Commission. The twelfth annual report of that Commission discloses that, during the fiscal year ending June 30, 1916, 12 electric utility companies, with combined total assets of over $1,162,302,236, were divested by the SEC. In addition, 35 companies, with combined total assets of over

$1,891,271,757 were subject to divestment orders then outstanding. These companies will no longer be subject to regulation by the Securities and Exchange Commission as subsidiaries of registered holding companies, and in the future their corporate and financial practices will be subject, as the act now stands, to regulation by the Power Commission to prevent recurrence of the abuses of the past.

The purpose of Congress to go beyond the mere regulation of interstate wholesale rates and service and to use its constitutional powers over all companies engaging in interstate commerce in electric energy to remedy the abuses disclosed by the Federal Trade Commission, is plain from the provisions of part II and III of the Federal Power Act and from its legislative history.

Numerous provisions of parts II and III of the Federal Power Act are clearly not ancillary to or incidents of regulation of interstate wholesale rates or service. Among such provisions are those of section 305 (a), prohibiting officers and directors from profiting in the issuance and sale of utility securities and prohibiting payment of dividend out of capital: section 305 (b), restricting interlocking managements of electric utilities and underwriters or electrical equipment supplies: section 203 (a) regulating the sale, lease, or merger of facilities, and regulating the acquisition of securities of other companies; section 204, regulating the issuance of securities; and section 206 (b), authorizing investigation and determination of cost of service in certain cases where the Commission has no authority to fix rates.

The purpose to confer regulatory authority not limited to the regulation of interstate wholesale rates and service is also made clear by a comparison of section 208 with sections 301 and 302. While section 208 confers powers on the Commission to investigate and determine costs, depreciation, and other facts

"when found necessary for rate-making purposes," section 301 and 302 confer upon the Commission broad powers to regulate the accounting of the electric utilities subject to the act, not so limited.

That these regulations were all considered independent of the regulation of rates clearly appears from the legislative history of the act. The Senate report on the bill treats the regulation of wholesale rates as simply one among several purposes of the proposed legis-(511)lation (S. Rept. No. 621, 71th Cong., 1st sess. P. 18). It characterizes section 203 (a), providing for Commission control over the disposal, merger, or consolidation of facilities, as furnishing "an essential check upon the development of the industry along uneconomic lines." It referred to the section as complementing the Public Utility Holding Company Act of 1935–

by directing the Commission to prevent transfers or consolidation of property which would impair the ability of public utilities to render adequate service or impede, or tend to impede, the coordination in the public interest of facilities subject to the jurisdiction of the Commission id. p. 50).

Again, in explaining the Commission's control over the acquisition of securities of other public utilities, the Senate report stated that –

in this way the Commission would have authority to keep the same kind of check upon the creation of spheres of influence among operating companies that the Securities and Exchange Commission has over holding companies under title I.

At the hearings on the Federal Power Act, witnesses, including representatives of the utility industry, emphasized the importance of uniform and sound accounting regulation as an aid to the elimination of past abuses and the prevention of their

recurrence (hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5423 (74th Cong., 1st sess.), pp. 345, 807-809, 1106-1107, 1307-1308, 1920). There was testimony by some witnesses that sound accounting alone was sufficient to cure the abuses (id. pp. 919, 1343) and the report of the Senate committee stated categorically that –

The authority of the Commission over the accounts of companies under its jurisdiction extends to the entire business of such companies (S. Rep. No. 621, 74th Cong., 1st sess., p. 53).

At attempt was made before the enactment of the act to amend the Federal accounting authority conferred by the act by providing that –

If, with respect to * * * the method of keeping accounts * * * any person is subject to the law of any State or regulation by a State commission, such person shall not be subject to the requirements (of the net) with respect to the same subject matter.

Although this amendment, offered on the floor of the House was adopted just before the vote on the bill in the House (79 Congressional Record 10574-10575), it was eliminated in conference (H. Rept. No. 1903, 74th Cong., 1st sess., pp. 63, 75).

At the House committee hearings on H. R. 5423, Dozier A. DeVane, Solicitor for the Federal Power Commission, and one of the original draftsmen of the bill (hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5123 (74th Cong. 1st sess.), p. 515), made clear the independent importance of the provisions of the bill not relating to rates (id. P. 2170):

Mr. Hooker and every representative of the industry who has appeared before this committee has assumed that the sole purpose of title II of this bill is to regulate wholesale rates and their proceed to minimize the importance of or necessity for

such regulation. I do not have to tell the members of the committee that the actual fixing of rates is but a small part of the regulation sought to be accomplished by this bill. In the regulatory legislation which this committee has recommended and the Congress had adopted, more attention has been given to the character of service and facilities, the duties which must be performed, the construction, extension, and abandonment of facilities, the issuance of securities and the regulation of accounting than to the rate provisions themselves. I have already pointed out to you that every one of the regulatory provi-(512) sions in this bill has a clear analogy in the Interstate Commerce Act or the Communications Act. It was not until 1906, 19 years after the original Interstate Commerce Act was passed, that the Interstate Commerce Commission was given authority actually to fix a rate. It was not until 1920 that it was empowered to prescribe minimum as well as maximum rates.

Every single person so far as I know, who has appeared before you, has stated that power in one form or another should be conferred upon some regulatory agency created by the Congress to fix wholesale rates for energy transmitted in interstate commerce. Without minimizing in the least the importance of such legislation. I say to you this this bill should pass if it confers no authority over rates whatever and if for any reason Congress was compelled, which, of course, it is not, to choose between the rate provisions and the other provisions of this bill the public interest would be best served by enacting into law the other provisions of this bill.

During the debates, Representative Lea had this to say with respect to the independent purpose of the accounting provisions:

One of the most important features in this measure, as I view it, is that referring to accounts. The theory of this bill is to provide a unified accounting system for the public utilities of the United States. It would provide a common language for

accounting methods and meanings. It would help to standardize accounting methods and give stability and certainty to utility values (70 Congressional Record, 10378-79).

The Senate Committee in reporting the Federal Power Act pointed up the dual purposes of the act, when it said:

The decision of the Supreme Court in *Public Utilities Commission v. Attleboro Steam & E. Co.* (273 U. S. 83) placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States. *Other features of this interstate utility business are equality immune from State control either legally or practically.* (Emphasis supplied.)

With such manifestations of the purposes of Congress, the Commission would have been derelict in its duty if it had not administered the act so as to accomplish those purposes. In carrying those purposes into effect every assertion of jurisdiction in hundreds of orders issued, with one exception, has been accepted, or if not voluntarily accepted has been affirmed by the courts. This unusual record makes it authoritatively certain that the Commission has not "attempted to grab power for itself by asserting jurisdiction over companies and activities never intended by Congress," has not misinterpreted "the laws of Congress in such a way as to give it the broadest possible field of jurisdiction without restraint;" and has not violated "the letter and spirit of the Federal Power Act."

In the one exception *The Connecticut Light & Power Co.* case, the United States Court of Appeals for the District of Columbia did affirm the Commission's order, but the Supreme Court caused the matter to be remanded to the Commission for further consideration. The case was unusual in the lengths to which the company went, even at some financial loss, to cut its interstate interconnections after the Commission had initiated proceedings against it. Two were cut while the proceeding was

pending and the cutting of the third and last was imminent when the Commission finally disposed of the case following the Supreme Court's remand.

THE EXEMPTIONS PROPOSED IN H. R. 2972

H. R. 2972, while not purporting to change the purposes of the Federal Power Act, actually does so. Congress can, of course, change those purposes. If that is to be done, however, there should be a clear

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(525) There is, however, a considerable difference between the proponents, as shown by their testimony here, and the Commission, in the understanding of just what the "Attleboro gap," so-called, was. We have the statement of the proponents that the gap consisted of sales at State boundaries between a company in one State and a company in another State. That is the kind of a situation which was involved in the Attleboro case, a sale by a Narragansett company at the State boundary between Rhode Island and Massachusetts, to a Massachusetts company. The Rhode Island company owned the transmission line right up to the State boundary and the Massachusetts company owned the continuation of the same line from there on to Attleboro. But the Attleboro decision in the principles which it applied and enunciated and the cases which it cited was not limited to a sale which is made at the State boundary.

It includes, in the first place, sales beyond the State boundary of electric energy moving from one State to another. That is made clear by the fact that the opinion in that case explicitly states that the point which the title to the energy passes is "wholly immaterial" and relies on *Missouri v. Kansas, Natural Gas Company* (265 U. S. 298).

There two States, Kansas and Missouri, had attempted to regulate the rates, which an interstate pipe line could charge in Kansas and Missouri, respectively, for gas which came in part from Oklahoma and in part from Kansas. The Supreme Court held that a State could not regulate the sale, at wholesale within its boundaries, of gas brought into the State from outside of the State, thereby making it perfectly plain that it is not only the sale at the State boundary, but the sale beyond the State boundary of a commodity–in that case gas–brought from out of the State which is beyond regulation by the State. The Supreme Court in the *Attleboro* case, where electric energy was involved, cited the gas case and applied the same principles.

Now, the proponents–and I do not want to violate the chairman's injunction against engaging in rebuttal, but much of what proponents say in a hearing like this throws light on the purpose of the legislation and I cannot deal with it without citing that. If I offend against what you think is proper, Mr. Chairman. I do not mean to, and I want you to stop me: but I think it will help in some instances to refer to it.

Mr. HALL. That will help us too. What I had in mind was going over their testimony item by item, taking some witness's testimony and going over it item by item, or taking each witnesses' testimony. You may proceed, and we will be very glad to have you comment on that.

Mr. WAHRENBROCK. That you. I thought that would be helpful.

Now, Mr. Brown at page 545 of the transcript said that wholesale sales after the first sale–assuming that the first sale was at the State boundary, or shortly beyond the State boundary–said that those wholesale sales after that first sale should be exempted. I assume that he implies that such sales are subject to regulation by the States.

The Supreme Court has had that problem before it in the case of gas–not in the case of electric energy–but the same principles

would apply. The case to which I refer is *Illinois Natural Gas Company v. Central Illinois Public Service Company* (314 U. S. 498).

I think these points can be understood if a part of my prepared statement can be referred to where I have the diagram illustrations. (526) That case is illustrated by diagram No. 5 on page 24 of my prepared statement (Tr. 1155) where we have an instance of a source of supply of electric energy in State X at (G) and the transmission line and generating plant is owned by company A. The transmission line from that generating plan crosses the State boundary into State Y, where there is a sale at wholesale to B. All B's facilities are located in one State, Y. B in turn sells to C within the same State and C locally distributes the energy.

Now, that is the type of situation which was involved in the *Illinois Natural Gas Company* case. There the Supreme Court held that the sale by B, all of whose facilities were located within the State of Illinois to C, was not subject to regulation by the State of Illinois, because the gas involved was gas which B had bought from a pipe-line company which brought it into the State from out of State.

Now, does the committee want to ask me any questions? My remarks are extemporaneous and I will be glad to respond as I go along or at the end of my statement.

MR. MILLER. I am not a lawyer. I am just wondering if the emphasis was on the pipe line, because there has been a good deal of discussion of that in this committee in connection with the gas hearings, and I wonder if the fact that the pipe-line company was a common carrier had any bearing.

Mr. WAHRENBROCK. I would say from my reading of those cases it makes no difference whether the commodity involved is natural gas or whether it is electric energy. I am not an expert on the Natural Gas Act, but I do not believe that the pipe-line companies were common carriers prior to the Natural Gas Act and I think it is a question, depending on what you mean, whether they are now. I doubt if they are now. They do have

certain obligations of public service which you commonly think of a common carrier having, but they are not made common carriers, as I understand it. However I am not as familiar with that act as the Natural Gas Act bureaucrats in the Federal Power Commission are.

Now, it is also clear from the *Attleboro* opinion that not only the sales at the State line and beyond the State line, but sales of electric energy *before* the State line is reached, are subject to the same principles which were applied in the *Attleboro* case. That is made clear by the citation in the *Attleboro* case of *Shafer v. Farmers Grain Company* (268 U. S. 189). There the commodity involved was wheat. The State had attempted to regulate the purchase of wheat and the conditions under which wheat was purchased by country grain elevators, which brought the wheat from farmers that drove in their with their wagons and dumped wheat into the elevator pits, and they, having processed the wheat, shipped it out into other States by common carriers.

There is was held that the attempt of the State to regulate those elevator operations–the conditions of those purchases of grain–was beyond its competence. The citation of that case, then, in the *Attleboro* case completes the picture, as it seems to me, from the legal point of view. Interstate commerce in electric energy, like that in gas and in wheat is beyond the power of the States to regulate beginning with the sale to the first purchaser, when the production is complete, continuing through the whole process by which it is carried out (527) of State to the point of local distribution in another State including the sale to the company which locally distributes. It was that gap in the power of the States to regulate which the Federal Power Act was enacted to fill.

The definitions of the act are explicit and carefully drawn so that the rate and service provisions of the act shall exactly plug the gap which those decisions had revealed. The Federal Power Act provides that the Commission shall have jurisdiction over companies that own or operate facilities for the transmission or sale at wholesale of electric energy in interstate commerce, but

shall not have jurisdiction over facilities for local distribution or generation or for transmission of electric energy consumed wholly by the transmitter or for transmission wholly in intrastate commerce.

MR. HALL. May I interrupt you to ask, did I understand you to say that the 1935 act was passed to close the so-called Attleboro gap and that purpose alone?

Mr. WAHRENBROCK. Not that purpose alone. I am discussing now the first of these two purposes, and we are in agreement with the proponents at least verbally, that that is one of the purposes. I am saying that in the regulation of rates and services the definitions have been so drawn as to exactly plug, and no more, the Attleboro gap. By this exemption of generating facilities, local distribution facilities, and the others that are mentioned in that "but clause." Congress exempted what had been excluded from the area which, in the cases culminating in the *Attleboro* case, the Court held was beyond the States.

The Supreme Court had held in tax cases–and they were cited in the history of the 1935 legislation–that generation was subject to State regulation, even though the energy was immediately sent out of the State. That was in *Utah v. Pfost:* It had held that local distribution was subject to regulation by the States, even though all of the energy distributed came from out of the State. Therefore, both of those exemptions were explicitly written into the act. Intrastate transmission–of course that was not a part of the gap so that was eliminated. Transmission of electric energy consumed wholly by the transmitter was obviously. I should suppose, a recognition of the holding of the Supreme Court in the so-called *Pipe Line Cases* where an oil pipe line company that took oil from one State to another for its own use was held subject to State jurisdiction. The definitions of the act were designed and drawn with care so that the rate and service provisions should exactly plug the gap which previous Supreme Court decisions had shown existed, and no more.

Now, so far as I am aware, there is no charge: no charge has ever been made, that the Federal Power Commission has ever

purported to regulate rates or services outside of that gap and Mr. C. W. Smith in his testimony will touch on that more fully.

I want now to turn to the second purpose of the Federal Power Act as disclosed by the legislative history.

Mr. MILLER. Pardon me, but do you intend to give us the second point in the *Attleboro* case? You said the first one was to close the gap and I believe that the chairman interrupted you there. I do not think I caught the second one.

(528) Mr. WAHRENBROCK. Now, I am not sure that I know what you refer to. I was not going to make any further point about the *Attleboro* case. I was going to give what we had regarded as the second purpose, general purpose, of the 1935 legislation.

Mr. MILLER. I misunderstood you. I thought that you were referring to the *Attleboro* case when you referred to the second point.

Mr. WAHRENBROCK. The *Atteboro* case actually held a sale at the State line beyond the power of the State to regulate and it relied upon cases including both cases beyond the State line and cases prior to the State line and said that it made no difference at what point the title passed, that so long as the electric energy or oil or gas was moving in interstate commerce, it was beyond the power of the State to regulate beyond the point of generation and up to the point of local distribution.

Mr. MILLER. You said that the 1935 amendments were adopted first of all to close the gap pointed out in the *Attleboro* decision?

Mr. WAHRENBROCK. Yes, sir.

Mr. MILLER. And for some other reason, a second reason.

Mr. WAHRENBROCK. Yes: I will mention those now.

Mr. MILLER. I did not know whether you had forgotten that or not, I am sorry.

Mr. WAHRENBROCK. I am glad to have an opportunity to make that plain, because while there is at least verbal agreement among the proponents and ourselves apparently with respect to the filling of the Attleboro gap, the proponents of this

legislation, in their testimony here have either overlooked or denied the existence of what we believe to be the second purpose of this legislation, and that was to correct the corporate and financial abuses in the utility industry which had been disclosed by the Federal Trade Commission investigation.

Mr. HESELTON. Did you say second or secondary?

Mr. WAHRENBROCK. I did not say secondary. The Supreme Court has characterized the filling of the Attleboro gap as a primary purpose.

Mr. HESELTON. I wanted to get your exact expression.

Mr. WAHRENBROCK. I said second. The Supreme Court has not excluded other purposes as being of equal importance. It has referred to this one as a primary purpose, the filling of the Attleboro gap as a primary purpose.

Mr. HESELTON. May I interrupt you there again, because I have made a note and you now for the second time I think have said in the record "a" primary purpose. Was it "a" primary purpose or "the" primary purpose?

Mr. WAHRENBROCK. I am glad you asked that. The Court uses "the primary purpose."

Mr. HESELTON. And that is repeated in the *New Jersey* case and *Connecticut* case?

Mr. WAHRENBROCK. That was used in the *New Jersey* case first by Mr. Justice Reed.

Mr. HESELTON. And reaffirmed in the *Connecticut* case?

Mr. WAHRENBROCK. And quoted by Mr. Justice Jackson in the *Connecticut* case. It is interesting to note that in the *Jersey Central* case Mr. Justice Reed used it in writing an opinion which affirmed the jurisdiction of the Commission over a company which the Commission had found owned facilities for transmission of electric energy. The

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(548) Mr. HESELTON. I want to refer again and want your reaction to this specific quotation from the hearings in the House

where it is said that the first objective of the bill is a complement to State regulation of rates. As a part of that complement the bill provides that the Federal Power Commission may regulate the rates that no State commission can regulate.

Mr. WAHRENBROCK. That is right.

Mr. HESELTON And the bill simply fills this gap, and that is all.

Now, that is pretty emphatic language.

Mr. WAHRENBROCK. May I make this plain. What is there being talked about–and I think you will agree with me–is a regulation of rates.

Mr. HESELTON. That is right.

Mr. WAHRENBROCK. And no one charges before this committee or any place else that the Federal Power Commission has ever issued any rate of service order which has encroached on any rate or service which the State had constitutional power to regulate. No one has ever charged that. The fact of the matter is that Mr. Benton, in the George Washington Law Review article referred to, himself says that that is the fact: that we have never gone beyond that. That has been recognized clearly. There is no question about that.

Mr. HESELTON. All right. My next question is, Why does not all of the testimony we have in the hearings indicate the same intention? It is reported over and over again, and I read from the record yesterday, that it was the intention of Congress at that time to supplement and assist the States and not oust them from jurisdiction.

Mr. WAHRENBROCK. That is right. Now, that is exactly what I have been saying. I think you and I have a little bit of difference in our minds, but the wording is the same, and I want to point out what I said earlier–I think you were not in the room when I said it–that the second purpose was to prevent corporate and financial abuses by supplementing State regulation in the field in which the States legally might have the power but which those very reports–and I read one of them when you were not

here, the report of Senator Wheeler–pointed out that the States had not as a legal or practical matter effectively regulated the companies within the States.

Mr. HESELTON. I want to ask one final question and then I am through.

You do not contend that the Securities and Exchange Commission does not do an effective job, do you?

Mr. WAHRENBROCK. I am glad you brought that up, because there was one reference to it previously and there seems to have been in the minds of some of the members of the committee that there is possibly a field in which there might be overlapping between the Federal Power Commission and the Securities and Exchange Commission.

Section 318 of the Federal Power Act effectively prevents that. It says that whenever a person is subject to a requirement of the Public Utility Holding Company Act or of any order, rule, or regulation thereunder, it shall not be subject to any requirement of the Federal Power Act or any order, rule, or regulation under that act with respect to the same subject matter.

Now, as the Securities and Exchange Commission breaks up the holding company systems and turns loose the independent companies,

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(551) Now, the sale of the Western Massachusetts Co. to the Middletown Co. is made at the State boundary.

What I was just trying to say was that the transmission line from the Massachusetts boundary to Middletown, where the local distribution takes place, is a transmission facility which it was one of the purposes of the framers of the Federal Power Act to provide, should be available for interstate use and service. The State of Connecticut could not tell the Middletown Co. to serve Hartford or to serve Taftvale, or any of the other communities along the route, if the companies in those communities needed service; if in a wartime emergency they

needed the power that was available on that high tension line, and because of a competitive relationship they could not get it by bargaining.

Now, section 202 (b) of the Federal Power Act gives the Federal Power Commission the authority, on the application of the State commission or the application of a private company to compel that interstate company to serve others who may want service.

Mr. MILLER. You say that the Connecticut commission could not compel them to serve any company or any community in Connecticut?

Mr. WAHRENBROCK. That is right. That is interstate transmission. That follows from the principles of the Attleboro case.

Mr. HALL. Let us assume that Congress said that it was not an interstate line from the Connecticut border.

Mr. WAHRENBROCK. Congress cannot say that. What is interstate commerce is interstate commerce.

Mr. MILLER. It is not interstate commerce though.

Mr. HALL. In other words, that is the Attleboro gap?

Mr. WAHRENBROCK. That is within the Attleboro gap.

That is what I meant to point out in connection with the Central Illinois Public Service Co. case to which I referred earlier (314 U. S. 498). There was a case in which, and I am glad you asked that question, because I did not make that aspect of that case clear, there was a case in which the Illinois Commission tried to compel service by a company, all of whose transmission was just exactly that of the Middleton Co. It bought, not at the State line, but inside the State, and the Commission tried to compel that company to serve a local distributing company in the State, and the Supreme Court held that that effort was unavailing and they struck down that order. That is then part of the Attleboro gap.

In spite of my efforts to get forward, and I may not seem to have been succeeding, but I have been trying, I am using more time than I had expected and if the committee is going to

adjourn today I want the witnesses that follow me to have some time. I have only covered the first exemption. I have five to go. They will not take quite as long, but I do have more. I wonder if I ought to raise that question as to how much time is left and where we are.

Mr. HALL. I am going to finish this with one more hearing. Everybody will have to condense in order to finish. In other words, that means that we will have no more than 2½ hours, and I think by that time the committee will have been very generous with both sides of the case.

Mr. MILLER. Before you leave that, you way that this language in 2972 which we have discussed, contrary to what he proponents say, (552) does leave a gap. I do not care whether it is the Attleboro gap or not, but it leaves a gap that cannot be controlled by either the State or Federal Government. That, briefly, is the picture?

Mr. WAHRENBROCK. That is right.

Mr. HESELTON. I am confused. I have the syllabus in the Attleboro case before me. I had always understood that the difficulty there lay in the inability of the State of Rhode Island to regulate the transmission of the energy to the line in Rhode Island and that there was no concern as to the regulation over the transmission from the Rhode Island line into Massachusetts. In other words, the Chairman has placed the emphasis in his example on the ability of Connecticut to regulate transmission from the State line down into Connecticut, and you have turned this around and said that it is analogous to the Attleboro case, when, as a matter of fact, it seems to me it is not.

Mr. WAHRENBROCK. I think what has given rise to the difficulty here is this: You are right. In this aspect of the Attleboro case, the Rhode Island commission sought to prevent the Narragansett Co. from charging its affiliate in Massachusetts a low price for the energy that was shipped up to Massachusetts. It said that is so low that our citizens are being discriminated against and our citizens are having to pay a higher rate. It,

therefore, attempted to increase that rate. The Supreme Court said, "That is outside of your power to do."

Mr. HESELTON. Using the chairman's example, that would be as though the Massachusetts Public Utilities Commission attempted to do that and found that it could not under the Attleboro decision, but it does not decide the question as to the control by the Connecticut commission over the rates within intrastate commerce in Connecticut. Am I right about that?

Mr. WAHRENBROCK. I am applying the principles that were relied on in deciding the Attleboro case and were subsequently applied by the court in this Illinois case to which I have referred and not merely the limited holding in the Attleboro case. I think you are thinking of the immediate holding in that case only.

In the Central Illinois Public Service Co. case there was not only the regulation of the rate, but, also, the regulation of service.

This first exemption is not conferred merely by one clause, but there are two clauses. There is the language which appears in lines 7 to 12 on page 2 of the bill, which apparently is intended to accomplish something of the same thing. What makes it extremely difficult from the point of one who views this, as I do, in attempting to see how it would be enforced, is to understand why it is necessary to write two provisions to accomplish the same purpose. When that is done, it begins to look as though there is more than one purpose in mind and makes one seek to ascertain why duplicating language is necessary to accomplish one purpose.

The second exemption is that which appears on page 3, lines 2 to 10. That is where energy, generated in the State, is sold to another company which takes part of it out of the State, unless the principal purpose of the sale is the transmission out of State.

This was stated by Mr. Brown at transcript 536 as being designed to obviate such situations as the Jersey Central situation. Again, we have duplicate provisions to accomplish the same thing, because the type of provision which appears on page 3, lines 11 to 20, is stated

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(553) by Mr. Brown, also, to be aimed at the same type of situation, that is, the exemption of exchange agreements or arrangements which are for emergency energy or economy energy or involve only a slop-over.

Mr. HESELTON. That is the slop-over provision in that section.

Mr. WAHRENBROCK. I think that is probably the least important part of it, but I am pointing out now that there are these duplicate provisions both of which are explained as being intended to deal with the Jersey Central problem.

Mr. MILLER. There was a good deal of discussion as to why that language is duplicated. It would seem to me that they were saying the same think, but in the testimony that was explained. All I can say is that I will have to look up the reason again, but I thought, as you did, it seemed funny to put that in twice, but there was a reason given that seemed perfectly reasonable and harmless to me.

Mr. WAHRENBROCK. If one is adequate for the purpose which the proponents of the legislation state, and I am speaking of Mr. Brown in particular, the one that they urged, that he included, I do not see why it is necessary to add the other for the same purpose.

Mr. MILLER. There is a good reason for that. I will look it up this evening.

Mr. WAHRENBROCK. From the point of view of one who has attempted to prove these matters, to establish them by examination of witnesses, by documentary evidence, I might say that this qualification involving the principal purpose might just as well not be there. I mean the principal purpose of the sale. Because I think any of you who are lawyers will appreciate that it is going to be impossible, practically impossible, to prove the principal purpose. You have to determine the mental purpose of people and do that when all of the incentive to them is not to disclose their purpose, or if anything, to disclose some other

purpose. To get proof of principal purpose is going to be impossible. That is an unworkable exception. And it just simply, then, stands as a practical matter that where the energy is sold and part of it goes out of the State and the whole sale is exempt. That again is to exempt a sale which is beyond the power of the States to regulate, even as to the sale price. A State cannot regulate the price charged for energy that is going out of the State whether it is before the State line is crossed or after. So here is a case where again the Attleboro gap with respect to rates and service itself is re-created literally and the purpose to protect against financial and corporate abuses is weakened and broken down so far as companies are by this exemption eliminated.

Mr. MILLER. I did not get the language that you are discussing.

Mr. WAHRENBROCK. I am discussing the sale where part of the energy goes out of the State.

Mr. HESELTON. Section 2.

Mr. WAHRENBROCK. That is page 3, lines 2 to 10.

I want to point out that the result of the Jersey Central case is not to bring within the Commission's jurisdiction any company within the State which is interconnected with another company that has out-of-State connections, the result of that case is not to make every such company subject to the jurisdiction of the Federal Power Commission. Mr. Justice Reed, in his opinion in the Jersey Central case, dealt with the very contention which was advanced by the company there, and (554) he said in that case, "Mere connection determines nothing." What has to be ascertained, and what he said had been ascertained, and which he found substantial evidence to support, is that there was energy generated in one State which was transmitted over the facilities of the Jersey Central Co. and transmitted from that State and consumed in another State. The effect of that is that if you exempt that kind of transaction, there is a transaction which is within the Attleboro gap which is taken out of regulation again. There is not a single one of these exemptions which does

not re-create the Attleboro gap as to rates and service as well as destroying the second purpose.

I say a single one, that does not apply to the immunity provision. That is one of them.

Mr. MILLER. By gap you mean that they would be controlled by neither the State nor the Federal Government?

Mr. WAHRENBROCK. That is right.

Mr. HESELTON. As one member of this committee I have no desire to see any legislation that leaves any company unregulated. I think that the gap should be completely filled, and I think, although you are making a splendid statement, you are wasting your energy on me.

Mr. MILLER. Likewise.

Mr. WAHRENBROCK. Maybe I am not. If I can point out that it is not merely a question of exempting a company, but of exempting transactions. These companies may, as to many transactions, be subject to State regulation, but I am calling your attention that as to the particular type that is being exempted, they will not be. Do I make that point clear?

Mr. HESELTON. Again, I thank you for that statement.

Mr. MILLER. Before you leave that, what public interest is involved in that second amendment to subsection (c)?

Mr. WAHRENBROCK. Just what Mr. Justice Reed referred to in the Jersey Central case. If the Jersey Central Co., which transmits energy and delivers it to the Public Service Co., which, in turn, delivers part of that energy into New York and there sells it, if the Jersey Central Co. can fix a rate, a high rate, for that energy, then the Public Service Co., which resells that across to a New York company, has to pass on that high rate, and the State of New York which is interested in protecting its consumers against high rates is powerless to do so because the increment of cost is beyond its power to control.

Mr. MILLER. Suppose the circumstances were reversed because of the interconnection, you might be able to get their power from some company such as you have outlined that has

peak capacity at a lower rate. That might go the other way. It would give them a reduced cost.

Mr. WAHRENBROCK. That is right. And the jurisdiction that is given to the Federal Power Commission is to assure that every advantage of such reduced cost shall inure to the benefit of the consumers in other States.

The next exemption is that a company in one State shall not be a public utility by interconnection with a Government agency. That is on page 5 of the bill, lines 1 to 11.

Mr. Brown said that was to exempt situations like the Connecticut Light & Power Co.'s sale to the borough of Groton.

If that is the purpose as Mr. Brown said it was, then we have the case again of a duplicate provision because the sale to the borough (555) of Groton falls exactly within the preceding exemption, that is, the principal purpose exemption, and it seems remarkable that three or four necessities of the Connecticut Light & Power case and the Jersey Central case should give rise to so many overlapping and duplicative provisions, if that is the only purpose intended.

MR. MILLER. Why do you take Mr. Brown's opinion as to the interpretation of the legislation. I do not know the gentleman; I have never talked to him. I certainly know that he has never talked to me about the bill. That is four or five times that you have taken his particular statement, his interpretation, as your authority.

MR. WAHRENBROCK. I want to be perfectly frank as to why I did that; that is, the reason I did that. As I went over the statements of the proponents of the bill, Mr. Brown and Mr. O.D. Smith were the only two lawyers, the only two men, who explained the purposes of the provisions in detail, and Mr. Brown time and again said, "This exemption is designed to do this." No one stood up here and said he had drafted this bill. Mr. Benton assumed responsibility for the Boren bill, and so far as the language in part of this act corresponds to that, I suppose the authorship is apparent.

FEDERAL POWER COMMISSION.
Washington 25, June 13, 1947.

HON. CHARLES A. WOLVERTON,
Chairman, Committee on Interstate and Foreign Commerce,
United States House of Representatives,
Washington, D.C.

MY DEAR MR. CHAIRMAN: In response to your request, the Federal Power Commission submits this report on H. R. 2972. This bill would amend part II of the Federal Power Act by providing exemptions for a majority of electric utilities now subject to regulation under that part of the act. That regulation extends to interstate wholesale electric rates and to certain corporate and financial practices of companies having facilities for interstate commerce in electric energy.

The first Federal regulation of this nature, provided by the Federal Water Power Act of 1920, was limited to a comparatively few electric utilities which had hydroelectric projects on public lands or involving navigable waters of the United States. But during the decade following 1920 there was a rapid growth of transmission networks interconnecting water-power and steam-generating plants and local distribution systems. This development constituted a long step in the transformation of the industry from an aggregation of isolated local plants to large interconnected systems covering many States.

As a localized industry, electric utilities had long been subject to local regulation, but in the expansion of the twenties the industry outgrew such regulation because of the practical difficulties and constitutional limitations which handicapped individual States. Toward the end of the decade Congress and the Executive became concerned over the need for Federal action, and the steps they then took led directly to enactment of the 1935 legislation.

While H.R. 2972 does not purport to amend any of the regulatory provisions of that legislation, the sweeping nature of the exemptions which it proposes would leave only a handful of

companies to be regulated. The bill therefore must be viewed as a substantial repeal of the regulation itself.

THE PROPOSED EXEMPTIONS WOULD BE A VIRTUAL REPEAL OF THE ACT

Congress, in section 201 of the Federal Power Act, described the electric utilities to be regulated as companies owning or operating facilities for the transmission, or sale at wholesale, for electric energy which is transmitted from any State and consumed outside thereof. Facilities used for generation, or in local distribution, or only for intrastate transmission, etc., were excluded. In addition, certain activities of companies otherwise subject to regulation were exempted. As the House Committee on Interstate and Foreign Commerce said:

> "The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. Provision is made for joint boards composed of members of State commissions which may be used for this purpose. The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions. Probably no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill."

The exemptions in the proposed bill, however, would go much further than the present statutory provisions limiting the scope of Federal regulations to (333) the extent of wholly disregarding the recognized needs which gave rise to this

Mr. O.D. Smith said that he only "helped them," and I do not know who "they" are, in the drafting of the bill.

When Mr. Brown said, "This provision is designed for so-and-so," and "this other provision is designed for so-and-so," and no other proponent purported to state what the purposes of these several provisions are, I naturally took that as the proponent's statement of what the bill was designed to do.

MR. MILLER. I assume full responsibility for the language, although I did not draw it, of course, but I went to the people who did as a result of correspondence that I knew indicated they had problems and tried to find out what their difficulties were, and there were half a dozen different people who contributed to the language and gave their thought, and the committee has before it 12 or 15 amendments to these 2 bills that have been submitted to us for consideration.

MR. WAHRENBROCK. I will make one final comment about this exemption of a company wholly in one State that it shall not be a public utility by reason of interconnection with a Government agency.

If a company by interconnection with a Government agency transmits or sells at wholesale any energy which goes out of the State and is consumed in another State or which comes from another State and is consumed in the first State, then that company is exempt from State regulation of that energy transmission in interstate commerce and the sale and wholesale in interstate commerce within the Attleboro gap, regardless of whether it comes and crosses the State boundary on Government facility or not. So this exemption, too, recreates, so far as it extends, the Attleboro gap with respect to the regulation of rates and service as well as destroying or withdrawing the safeguards against the financial and corporate abuses that I spoke of.

MR. MILLER. What would the situation be in the case of an intrastate company not now regulated by the Federal Power Commission that sold electrical energy to the city of New Haven, to use that as any illustration, and we will assume that it is a city-owned plant, the city plant in New Haven sells

electricity and runs a line across to Fisher's (556) Island, N.Y. What effect would that action have on your control of the intrastate company in Connecticut?

MR. WAHRENBROCK. You said an intrastate company not now subject to our jurisdiction. On the facts you have given, that company would not be subject to our jurisdiction.

MR. MILLER. That is what I want to get. The mere fact that they sold to a municipally owned company plant, and that plant in turn sold to Fisher's Island, which is owned by New York.

MR. WAHRENBROCK. That is energy which is transmitted from a State and consumed at a point outside thereof. Under the Attleboro and the preceding cases, the States are powerless to regulate the rate of that sale to the city of New Haven, and if you exempt that sale from Federal regulation, it is put in the no man's land of regulation.

MR. MILLER. As I understand, that was the situation that they attempted to cure.

MR. HALL. Do you think that if an amendment like this was placed in this bill it could cure that situation:

It is hereby declared to be in the public interest that the business of generating, transmitting, and selling electrical energy for ultimate public consumption shall be subject to public regulation, and to the extent that such business is not subject to the jurisdiction of the Commission under this act the same is hereby declared to be local in character and shall be subject to regulation by a State authority.

MR. WAHRENBROCK. That is the question which you asked me to be prepared to answer. That is Mr. Benton's amendment which would add a section 6 to H.R. 2972, and that in turn would add a subsection (g) to section 201.

The thing that concerns me in the first place about that is when it says, "by State authority," and the question which is immediately raised by that is authority of what State? Take your Attleboro case, it was there to the interest of Rhode Island to keep that rate high. It was there to the interest of Massachusetts to keep that rate low. Depending on which State authority you are going to have a tendency for a high or a low rate. If it is the

State authority in the State of production, the tendency will be a high rate. If in the State of consumption, the tendency will be a low rate. You have that conflict.

MR. HALL. Do you think that one State public utility will charge excessive rates to another State public utility?

MR. WAHRENBROCK. Well, in the absence of regulation, what is to prevent that?

MR. HALL. Where both of them have commissions?

MR. WAHRENBROCK. What incentive is there for the State of production to cut down the price which its citizens may receive from the citizens of another State?

MR. HALL. Do you think they will charge a rate which is all out of line with the rates that are charged to its local citizens?

MR. WAHRENBROCK. That, I submit, is a practical question for Congress.

MR. HALL. That is quite a lack of faith in cooperation between States, I would say.

MR. WAHRENBROCK. I do not think it implies lack of faith to say that utility rates need be regulated. I am pointing out here that the regulation is not by the State of the consumer which is the State that is interested in securing regulation. Regulation is expensive, (557) it is difficult, it requires prodding by the public that is interested in it. It should be responsive to the public upon whose behalf it is instituted. This conflict between he interests of the State of production and the State of consumption is essentially the problem which gave rise to the commerce clause. That is the reason we have a commerce clause. That is the reason in these cases which culminated in the Attleboro case the Supreme Court held that in the silence of Congress, with no attempt by Congress ever to regulate this industry, the States still could not regulate it. Now, that being true, I have considerable doubt that the case upon which Mr. Benton relied and which involved the continuation of a tax of insurance companies—a tax on aggregate premiums within a State, a matter which had traditionally been held to be within the power of the States in the silence of Congress—I have grave doubts whether that case, despite the breadth of the language of the

opinion, would be held to apply to validate discriminatory State regulation of rates.

MR. HALL. Have you any examples which would show that in the period before the enactment of the Federal power legislation one State commission would approve exorbitant charges for power generated in the State and sold to utilities in another State?

MR. WAHRENBROCK. The reason no such example can be cited is that the states were held not to have power to regulate those rates.

MR. HALL. Do you know of any example where the rates were exorbitant?

MR. WAHRENBROCK. Well now, as a lawyer I have not attempted to familiarize myself with rates and what the practices have been.

In connection with the question about Mr. Benton's amendment, Mr. Chairman, I would like to call this committee's attention, as probably I do not need to, to what this committee has recently said on that question in its report No. 800 of this Congress, this session, to accompany H.R. 4051, the Rizley bill. I refer to pages 10 and 11 of that report, where this committee in talking about the Rizley bill said:

The bill makes no change in the present law as to direct sales by pipe lines to industrial consumers which sales under the Natural Gas Act are exempt from Federal Power Commission jurisdiction. Your committee feels that no change is necessary in the public interest. Your committee has considered the amendment offered by the National Association of Railroad and Utility Commissioners proposing to permit the various States to exercise jurisdiction over direct sales and has concluded that the adoption of the amendment would not be in the public interest, but would be more likely to add to the existing confusion.

That was a similar, although more limited proposal, to that which you have just read to me, and here is what your committee says, and I read two or three sentences—

Your committee feels that to alter—

MR. HESELTON. You omitted one rather significant sentence.

MR. WAHRENBROCK. I have skipped a sentence.

MR. HESELTON. That sentence is:

That pipe line does not occupy a utility status with reference to direct sales.

That is what we are talking about in the paragraph, is it not?

MR. WAHRENBROCK. I recognize that. What I am going to say now does not indicate or does not represent a feeling on my part that what

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APPENDIX N

Hearings Before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce House of Representatives 80th Congress, 1st Session, (1947), excerpts from Testimony Nelson Lee Smith, Chairman, Federal Power Commission

N-1

FEDERAL POWER ACT

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

EIGHTIETH CONGRESS

FIRST SESSION

ON

H.R. 2972

A BILL TO AMEND SECTION 201

OF THE FEDERAL POWER ACT

AND

H.R. 2973

A BILL TO AMEND

THE FEDERAL POWER ACT

JUNE 23, 24, 26, JULY 2, 10 AND 11, 1947

Printed for the use of the
Committee on Interstate and Foreign Commerce

AMENDMENTS TO FEDERAL POWER ACT

WEDNESDAY, JULY 2, 1947

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE OF THE COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE.
Washington, D.C.

(331) The subcommittee met at 10 a.m., pursuant to call in room 1334, New House Office Building, Hon. Leonard W. Hall (chairman of the subcommittee) presiding.

Mr. Hall. The committee will come to order

We are resuming hearings on H. R. 2972 and H. R. 2973.

The purpose of the meeting this morning is to hear representatives of the Federal Power Commission.

STATEMENT OF NELSON LEE SMITH

Mr. Hall: Mrs. Smith, I understand that you have a short statement which you wish to make.

Commissioner Smith: Mr. Chairman, that is correct. My name is Nelson Lee Smith. Since the autumn of 1913 I have been a member of the Federal Power Commission, and on January 1 of this year I became its chairman. Previously I had served for nearly 8 years as chairman of the Public Service Commission of the State of New Hampshire, and in 1939 was president of the National Association of Railroad and Utilities Commissioner. I do, as the chairman has stated, wish to make a very brief general statement as an introduction to the Commission's presentation in opposition to H. R. 2972 and H. R. 2973.

There have been some rather regrettable references on this record to the greed for power of the Federal Power Commission and to a voracious appetite for authority which as led to its rapaciously reaching out and grasping for jurisdiction. At the outset I want to make it clear that the Federal Power Commission is well aware of the fact that it is an arm of the Congress, which created it. It possesses only the powers and duties which Congress has by statute given it. The Commission understands that its job is to administer and apply to particular situations the national policies which the Congress has laid down. In so doing it has an obligation to adhere scrupulously to the congressional intent.

When changes in the congressional instructions which govern our work are suggested, however, we believe—and I am sure you will agree—that it is our duty to present the results of our experience and our judgment regarding the effects of the proposed amendments. (332) In matters of this character and importance appeals to emotion or prejudice should, like personalities, have no place. The problem is an intellectual one, which calls, not for heat or feeling, but for light and for dispassionate analysis to disclose the merits of divergent positions.

It has been stated that the purpose of these bills is to clarify certain particular situations. In response to the committee's request, the Commission on June 13 filed reports on each of the two bills here under consideration, which I suppose have already been made a part of this record.

(The reports above referred to are as follows:)

legislation. The sweeping scope of those exemptions is apparent from a brief statement of their effect.

Under H. R. 2972. any company, now subject to regulation under part II because of its ownership or operation of facilities for transmission or sale at wholesale of electric energy in interstate commerce, would be exempted:

(1) If none of its facilities cross State boundaries and if the company also engages in local distribution (Sec. 2. p. 2, line 20. to p. 3, line 2); or

(2) Regardless of whether such facilities cross State Boundaries, if any sale or sales at wholesale of such energy are made in the State within which the energy is consumed, and if the company is also engaged in local distribution wholly within any one State. (Sec. 2, p. 2, line 20, to p. 3, line 2: this provision, although very confused, apparently would remove transmission facilities across State boundaries from Federal regulation in instances where the company's distribution facilities are located wholly in one State, thus going beyond the exemption provided in sec. 1 of the bill): or

(3) If by means of such facilities it transmits and sells at wholesale locally generated energy to a person transmitting a part thereof to another State, provided the purchaser is engaged in local distribution within the first State and the principal purpose of the sale is not transmission out of the State (sec. 2, p. 3, lines 2 to 10): or

(4) If the energy, which it transmits or sells at wholesale in interstate commerce, is exchanged and settlement therefor is made on a cost basis (sec. 2, p. 3, lines 11 to 20).

In addition:

(5) Any transmission or sale of electric energy in interstate commerce to or from a governmental agency

would not subject a company to the provisions of the Federal Power Act (sec. 5, p. 5).

(6) No sale of electric energy at wholesale in interstate commerce would remain subject to Federal regulation except where not only the seller but also the buyer would be subject to the narrowed jurisdiction of the Commission under the amendments. This exemption would include all sales to intrastate companies and all sales at the beginning of interstate commerce. (This is due to the provision that for a wholesale sale of electric energy to be one "in interstate commerce" it must be "in the course of transmission of such energy in interstate commerce as defined * * *" (sec. 3, p. 3, line 21, to p. 4, line 2) which apparently has the effect of requiring that both the buyer and seller must transmit the energy "in interstate commerce" under the narrowed meaning given that term.)

(7) Any company subject to any regulation by the act could violate the regulation and avoid being compelled to comply by ceasing to be a "public utility" under the act, either as a result of the taking effect of the amendment or by termination of the operations which would otherwise still subject it to the Commission's jurisdiction under the amended act (sec. 4, p. 4). Apparently also it could avoid the penalties for its violation the same way. There appears to be no obstacle to the resumption of the interstate operations as soon as the threat of enforcement has passed, permitting the company to play hide and seek with the Commission.

A check of available data indicates that, as a result of the enactment of the bill, at least three-fourths of the companies now subject to Commission regulation would be excluded. It is also apparent that the large number of overlapping exemptions and the difficulties of interpreting the act with the added provisos, escape clauses, and other exemptions, would multiply

the grounds of litigation and seriously complicate the administration of the act as to the companies which would remain subject. At the same time the numerous possibilities of easy escape would make it probable that in the everyday administration of the act the public interest would come off second best when it conflicted with the private interests of the affected utility.

HISTORY AND PURPOSES OF PART II

The Federal Water Power Act of 1920, forerunner of Part II of the Federal Power Act, as already indicated, dealt only with a comparatively few companies. Municipal and State regulation of electric utilities had developed early because they were engaged in public service: they enjoyed special privileges, were recognized as a practical monopoly, were given a protected market, had delegated to them the sovereign power of eminent domain, and were given the use of public (334) streets and highways. But as the industry grew and spread, interstate transmission of electric energy increased, taking it more and more out of the regulatory powers of the States and creating a situation in which many phases of utility activity could be reached only by congressional action.

This was emphasized in 1927 by the important decision of the Supreme Court in the Attleboro case, striking down an attempt of the State of Rhode Island to regulate rates which an electric utility in that State charged an affiliated Massachusetts company and which the Public Utility Commission of Rhode Island thought discriminated against consumers in Rhode Island.

In addition to constitutional limitations, individual States encountered increasing practical handicaps to effective regulation of the industry as operating companies were merged into larger aggregations and their capitalization, securities, and everyday operations and expenditures were manipulated in disregard of local interests. Warning signs of possible financial and corporate abuses began to be discerned which caused the

Congress in 1928 to initiate a comprehensive investigation of the utility industry by the Federal Trade Commission.

Even before that investigation was completed, President Hoover, in his annual message to Congress, December 3, 1929, recommended the enactment of legislation reorganizing the Federal Power Commission as an independent agency and providing Federal regulation to supplement State regulation of electric utilities.

A month later Senator Couzens of Michigan introduced a bill which went further than the President's recommendations and embodied many of the provisions found in the present law. Only that part of the bill providing for the reorganization of the Commission was enacted into law that year, however. Substantive legislation awaited the report of the Federal Trade Commission investigation.

The Federal Trade Commission report, when completed in 1935, disclosed among other things, as stated by its Chairman:

> "(1) That as a result of technological advances there had developed a large and increasing amount of interstate commerce in electric energy:
> "(2) That this had been accompanied by an enormous expansion of interstate commerce in the stocks, bonds, and other securities of companies engaged therein:
> "(3) That huge holding companies had gained and were exploiting their monopolistic control of such commerce carried on by their operating subsidiaries not only in production, transmission, and sale of electric current but in the floatation and sales of securities on a wildly speculative basis:
> "(4) That the resulting inflation of the capital structure of the industry had operated to inflate the rate base and the amounts paid by the consuming public for electricity: and

"(5) That all these unwholesome developments were beyond the effective reach of regulation by State utility commissions."

His statement continues:

"Many of the most serious abuses uncovered in the Commission's investigations were practices of misrepresentation and deception in financial matters through unsound accounting methods. This resulted in various forms of overstatement of capital assets, inflation of securities, and misrepresentation of income and surplus. The investigations disclosed large amounts of write-up and inflation. The capital assets of the holding and operating companies examined in the electric utility industry were written up in value over cost in one way or another by more than $1,400,000,000. * * *" (Davis, Ewin L., The Influence of the Federal Trade Commission's Investigation on Federal Regulation of Interstate Electric and Gas Utilities, 14 George Washington Law Review 23.)

In reporting the Federal Power Act the Senate Committee on Interstate Commerce, after referring to the increase in the proportion of electric energy crossing State boundaries from 10.7 percent in 1928 to 17.8 percent in 1933, said:

"The decision of the Supreme Court in *Public Utilities Commission v. Attleboro Steam & E. Co.* (273 U.S. 83) placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States. Other features of this interstate utility business are equally immune from State control either legally or practically."

Thus, in addition to seeking to correct the charging of unreasonable and discriminatory rates in interstate wholesale sales of electric energy which the States were constitutionally powerless to regulate, the act also sought to correct the following practices which were among those disclosed by the Trade Commission's report: Issuance of stocks and other securities on inflated assets; wr te-ups, inadequate depreciation reserves, and other accounting abuses; creation of spheres of influence by mergers of facilities, stock acquisitions, and inter(335)locking directorates; and payment of profits to affiliates out of operating expenses charged to consumers in the rates exacted.

As the Senate committee report said: "Part 2 places the utilities under the regulated conditions which have been prescribed for the principal other national utilities."

Finally, notwithstanding the fact that the unworkable doctrine of *Smythe v. Ames* still held full sway at that time, part II specifically authorized the Commission to ascertain the actual legitimate cost of every public utility, the original cost thereof, the depreciation therein and, when found necessary, other facts, thus carrying forward the regulatory concepts of the 1920 act.

EFFECT ON REGULATION OF RATES AND SERVICE

In exempting practically all sales of electric energy at wholesale in interstate commerce, as well as charges for transmission in interstate commerce, H. R. 2972 would recreate the no man's land in utility regulation which existed before the enactment of the Federal Power Act, resulting from the constitutional inability of the States to regulate such rates. The series of Supreme Court decisions between 1919 and 1927, invalidating repeated State efforts to regulate such rates, as referred to above, was one of the principal factors leading to the enactment of the act (*Public Utilities Commission v. Landon*, 249 U.S. 236 (1919); *Missouri v. Kansas Natural Gas*

Company, 265 U.S. 296 (1924); *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927)).

In the administration of the rate provisions of the Federal Power Act, the Commission has succeeded in establishing the prudent investment principals of rate-making, which has brought with it considerable direct results and probably much greater indirect results in annual reductions in rates to consumers.

The authority, upon request of another electric utility or a State commission, to require an interstate company to interconnect and sell electric energy at wholesale would similarly revert to the no man's land under the proposed amendments. This authority is associated in the act with the congressional purpose to assure an abundant supply of electric energy with the greatest possible economy and with regard to the prober utilization and conservation of natural resources.

The Commission does not believe that the public interest will be served by elimination of the Federal regulation above referred to.

EFFECT ON FINANCIAL REGULATION

In the administration of the act, the Commission, in cooperation with the Securities and Exchange Commission and the States, has been able to render an outstanding service to investors, consumers, and the general public in assuring sound corporate and financial practices.

Notwithstanding the importance of the information and publicity given by the Federal Trade Commission to the existence of write-ups and inflation in the capital structures of electric utilities, aggregating almost one and a half billion dollars, little had actually been done about it before the enactment of the Federal Power Act. Following approval of the act, a national uniform system of accounts based on original cost was promulgated. Capital accounts were required to be

reclassified. Proposed reclassifications, and the underlying cost studies, were examined with care. Where necessary, intensive investigations were made and exhaustive public hearings held. Definitive orders were issued prescribing the accounting reclassifications to be observed and the disposition to be made of write-ups and other excesses over original cost.

As a result, a total of $1,234,186,786 of write-ups and other excesses over original cost has been eliminated or is being eliminated from the accounts of 159 companies under orders issued by the Commission. This amount represents approximately 28 percent of the total reported fixed assets of those companies whose assets in turn represent about 75 percent of the total assets of the 302 companies which have filed reclassification and original cost studies.

Notwithstanding the substantial dollar amounts involved, most of these results have been achieved without formal hearings and without litigation. Where litigation has been necessary the Commission's orders have been sustained. *Northwestern Electric Co. v. Federal Power Commission* (321 U.S. 119); *Pacific Power & Light Co. v. Federal Power Commission* (141 F. (2d) 602); *California-Oregon Power Co. v. Federal Power Commission* (150 F. (2d) 25, certiorari denied, 326 U.S. 781); ef. *American Power & Light Co. v. Securities and Exchange Commis(336)sion* (158 F. (2d) 771 (C.C.A.1), certiorari denied. —U.S.—, No. 1214, October term 1946, decided May 19, 1947). Other companies have not only not opposed the Commission but some have actually gone farther than required by the Commission.

Here again, the Commission's experience indicates that it is against the public interest to permit these gains to be undone or frittered away: or to permit the companies that have not yet disposed of their write-ups and other excesses to avoid doing so; or to permit the former practices to be renewed or old write-ups to be reinstated.

STATE REGULATION

It should be clearly understood that none of these regulatory activities of the Commission interferes with the powers of the States to provide any regulatory requirements or safeguards they may deem necessary. And, of course, regulation of retail rates and local services is left to the States by the present act even where the energy moves in interstate commerce. Where State commissions may be interested in matters pending before the Federal Commission, they are notified and careful provision is made for full consultation and cooperation. State powers of regulation are in no instance weakened by the present act. State power to prescribe accounts required for their regulation of companies subject to their jurisdiction is expressly provided for by the present act, as well as their exclusive power, of regulation of security issues where a company is organized and operating in a State which has a commission regulating security issues.

EFFECTIVENESS OF ADMINISTRATION

Recognition of the value of the Commission's efforts in safeguarding the interests of both investors and consumers has come from those best able to appraise the accomplishment. An example from a representative of the investor viewpoint is found in a recent article appearing in the Wall Street Journal for January 23, 1947, the first of a series of articles on "Utility Operating Companies." The author, 2 years before in the same paper, had said that the Commission's "program of eliminating intangible items and write-ups from the property accounts of many companies" had strengthened "the fundamental position of the electric-utility industry." Now, in commenting upon the current strong financial position of the electric-utility industry, he again gives a predominant emphasis to the accounting adjustments ordered by this Commission in its original cost

proceedings, at the same time recognizing the close relation of those adjustments to the pressure for rate reductions.

An example of the views of consumer representatives is found in a statement by the general counsel of the National Institute of Municipal Law Officers, summing up the effect of the Commission's activities as follows:

"The Commission works in a most difficult field and one which is unspectacular from a publicity viewpoint, but the remarkable results from the Commission's work reveal that taxpayers receive more in tangible returns on their tax dollar for money spend on the Federal Power Commission than for any other Federal regulatory agency" (Rhyne, Charles S., *Municipal Interest in the Work of the Federal Power Commission* (1945) 14 George Washington Law Review 247, 260).

CONCLUSION

H. R. 2972 proposes by indirection to substantially repeal and make utterly unworkable the legislation which has thus so effectively supplemented and strengthened State regulation of electric utilities. This legislation has been a gradual development based on experience, and carefully framed in response to proven needs. Its history shows that it has been supported by both major parties irrespective of any narrow partisan considerations. Its administration has been quiet, but effective.

The administration of this legislation is, of course, not solely responsible for all the gains that have been registered. But neither is its value to be measured solely by the gains that can be seen: the amount of inflation eliminated; the effect of such elimination in accelerating rate reductions throughout the electric utility industry; and the lessening of the corporate and financial abuses formerly so prevalent in the industry. Not the least of the intangible gains are the constant development and improvement of methods of regulation, the training of competent personnel, and the practical demonstration that a

public service of (337) this kind, privately owned and privately managed, can successfully serve the public needs in a manner compatible with the public interest.

We believe that when the facts are understood, your committee will not report favorably this bill which would destroy this important legislation. Before any such report were made, we would respectfully ask for an opportunity to be heard.

The Bureau of the Budget, to whom this report has been submitted in accordance with Budget Circular A-19, advises that there would be no objection to the submission of this report to your committee.

Sincerely yours,

NELSON LEE SMITH, *Chairman.*

FEDERAL POWER COMMISSION REPORT ON H. R. 2973, A BILL TO AMEMD THE FEDERAL POWER ACT

The bill would amend two sections of part I of the act relative to the licensing of hydroelectric projects on streams and lands of the United States. Part I was originally the Federal Water Power Act, approved June 10, 1920, becoming without material change part I of the Federal Power Act by the amendment approved August 26, 1935.

This bill would reverse a national policy with respect to use of water resources that has been maintained for more than half a century. The drastic effect of the proposed amendments will be apparent if the development of this national policy is first briefly traced and the policy explained.

It was not until the close of the last century that the potentialities of central station electric generating plants became apparent. There was an accompanying realization that water power would develop far more energy through an electric generator than it would through the mere production of

mechanical energy to turn a few millstones; and, furthermore, the electric energy so generated could be made available for use in plants located many miles from the water-power plants.

The impetus of this scientific advancement led to expansion of the use of water power as a substitute for fuel. There naturally followed an increase in the pressure for permission to use water-power sites on Government lands and Federal streams. The River and Harbor Acts of 1884 and 1890 had been ineffective in protecting Federal streams and Congress passed the River and Harbor Act of March 3, 1899, which still stands as a bulwark against loss of the public benefits to be obtained from such waters.

The act of 1899 requires Federal approval for obstructions in navigable streams and for interference with lower navigable capacity. In order to provide uniform regulations under which dams across Federal streams could be constructed whenever specifically authorized by Congress, the General Dam Act of 1906 was adopted. These general regulations, however, were materially deficient in several respects, and on April 13, 1908, President Theodore Roosevelt returned to the House of Representatives without his approval a bill which would have granted further time for constructing a power plant in the Rainy River between Minnesota and Canada. In his veto message the President called for a number of special conditions to be incorporated in such authorizations and said: "It should be the duty of some designated official to see that in approving the plans, maximum development of the navigation and power is assured." Although the conditions outlined by the President in this and in his veto message on the James River bill furnished the framework for subsequent legislative policy, there were many long years of debate as to how far that policy should be extended and what public interests it should protect before it became crystallized in the Federal Water Power Act of 1920.

In 1910 Congress passed an amendment to the 1906 General Dam Act, including in the revision many but not all of the conditions mentioned by President Roosevelt. The 1910

revision provided that there should be a comprehensive plan for the development of a river and waterway system; that each project should be given consideration not only with a view to the locality where constructed but with reference to the entire water system of which it constituted a part, and the plans were to be so framed as to bring about the greatest possible development of navigation as well as water power. The acts of 1906 and 1910 were expressly subject to alteration, amendment, or repeal without obligation on the part of the United States, a condition of insecurity not altogether satisfactory to power developers.

APPENDIX O

Excerpts from Supreme Court Brief of Federal Power Commission in *Federal Power Commission v. Florida Power & Light Company*

O-1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 958

FEDERAL POWER COMMISSION, PETITIONER

v.

FLORIDA POWER & LIGHT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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* * *

(21)tions were created for facilities used in "local distribution" and facilities used only for the transmission of energy in intrastate commerce or for the transmission of energy consumed wholly by the transmitter (Section 201(b)). Finally, and most important, the Commission's rate jurisdiction over interstate sales was limited to sales at wholesale (*ibid.*); no authority over retail sales was granted.

The question presented in this case is whether FPL's facilities are used for the transmission of electric energy "in interstate commerce" so as to make FPL a "public utility" within the meaning of the Act. It is thus necessary to determine the meaning of the phrase "in interstate commerce."

In the first case to reach this Court under Section 201, *Jersey Central Power & Light Co. v. Federal Power Commission,* 319 U.S. 61, 70-71, a utility seeking to escape the jurisdiction of the Commission argued that the phrase "in interstate commerce" established a very restrictive test of jurisdiction; comparison was made to phrases such as "affecting commerce" of the "current of commerce" used in other regulatory statutes. The Court rejected such comparisons as tools for determining the scope of "interstate commerce," noting that the phrase was precisely defined by the Act itself. 319 U.S. at 70-71. This view of the jurisdictional standard embodied in Section 201 was confirmed by this Court in *Connecticut Light & Power Co. v. Federal Power Commission, supra,* 324 U.S. at 529-531, where it was noted that (22) the "terms of the grant of federal power," as opposed to the terms of limitation employed by Congress to limit jurisdiction, were (324 U.S. at 529):

> ***couched largely in the technical language of the electric art. Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.***

See also *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 209 n. 5. 215. Thus, the existence or absence of Commission jurisdiction over FPL turns to an analysis of the "engineering and scientific" data contained in the record before the Commission, an analysis the Commission is especially qualified to undertake.

Before turning to the bases for jurisdiction found by the Commission, we reemphasize the significance of this jurisdictional case. As noted, Congress was fully aware of the need for regional planning and coordination of electric systems when it passed the Federal Power Act amendments in 1935. But at that time only a fraction of the nation's systems were interconnected in interstate networks; since that time, interconnection has progressed markedly and the nation's bulk power systems are now being linked from coast to coast. Accordingly, in the words of the Commission "the interstate nature of the electric business, and the need for Federal regulation have steadily risen." Federal Power Commission Report on S. 1365, 90th Cong., (23) printed in Hearings on S. 1365 before the Senate Committee on Commerce, 90th Cong., 1st Sess., p. 5.[14] See also Hearings on H.R. 5348 before Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess., p. 118.[15]

The only immediate effect of the Commission's order in this case will be to require FPL to follow the Commission's Uniform

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[14] S. 1365 was introduced by Senators Holland and Smathers of Florida following the Commission's decision in this case and would have exempted from Commission jurisdiction any utility whose facilities were located entirely within one state and which did not transmit or receive electric energy by direct interconnection from or to any other state or by indirect connection except for temporary or emergency purposes. The bill was never reported out of committee.

[15] H.R. 5348, although differing slightly in language, was the companion bill to S. 1365. See n. 14, *supra*. It too was never reported out of committee.

System of Accounts, thereby subjecting FPL's operations to regulatory and public scrutiny on the same basis as the operations of other utilities. The establishment of jurisdiction over FPL would, however, empower the Commission to order FPL to interconnect with other utilities under certain circumstances, thus improving reliability of service and making possible economies for both parties to the interconnection. See Section 202 of the Act and our brief in *Federal Power Commission v. Florida Power Corp.*, No. 469, 1970 Term, argued February 24, 1971. Commission jurisdiction would also subject FPL's wholesale rates for any future interstate power (24)sales to regulation and FPL would be prohibited from granting undue preference to its wholesale customers as a class or discriminating among them individually (Sections 201(b) and 205). Finally, FPL would also be subject to the provisions of Sections 203 and 204 of the Act, requiring Commission approval of mergers, acquisitions and the issuance of securities, as well as the reporting and other requirements of Part III of the Act, Sections 301-319, 16 U.S.C. 825-825r.

In short, the establishment of jurisdiction in this case will subject one of the nation's largest electric utilities to the specific requirements of the Federal Power Act adopted by Congress to promote the coordinated and efficient deployment of the vast system of interconnected electric facilities which are necessary to meet the nation's power demands. And it will give the Commission the same authority over other similarly situated utilities.

II SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DETERMINATION THAT TRANSMISSION OF ELECTRIC ENERGY BETWEEN FPL AND INTERCONNECTED SYSTEMS IN OTHER STATES IS ESTABLISHED BY THEIR ELECTROMAGNETIC UNITY OF RESPONSE

The question whether FPL owns and operates facilities for the transmission of electric energy "in interstate commerce" as that phrase is used and defined in Section 201 of the Federal Power Act, is as we have seen (pp. 21-22, *supra*), a question of "engineering and scientific" fact. The only inquiry on judicial review is to whether the Commission's finding of the existence of that fact was supported by substan(25)tial evidence. See Section 313(b) of the Act; *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 209 n 5. An analysis of the record shows that there was an abundance of engineering and scientific data to support the Commission's expert conclusion.

As we have set forth in some detail in the Statement (see pp. 7-11, *supra*), the expert evidence introduced before the Commission by the staff established that all of the elements of the interconnected interstate network of which FPL, Corp and Georgia are a part are locked together in electromagnetic unity. Thus, FPL, Corp and Georgia operate in synchronism – *i.e.*, precisely at the same frequency–and the addition of a load or the outage of a generator on one system evokes an almost instantaneous response on the other systems as all generators automatically slow down to provide the additional power necessary to meet the load. The hearing examiner's conclusion that this cause and effect relationship constitutes interstate transmission of electric energy (App. 270) reflects the physical reality of the situation. Clearly, for a generator in one state to alter its mode of operation by reason of the addition of a load in another state, an appropriate signal must be transmitted from the load of the generator. The signal–an electric impulse–is none

other than a quantum of electric energy originating in one state and consumed in another.[16]

(26) The staff evidence, however, was not limited to the bare cause and effect relationship among interconnected facilities, but also concentrated on the degree of coordination of operations among FPL, the other members of the Florida Operating Committee and the other utilities forming the Interconnected Systems Group (see pp. 4-11, *supra*). The substantial interchanges of electric energy among FPL and other Committee members and between Corp and Georgia, the reliance by FPL on other systems for emergency power, and the common use by all ISG members of tie line control with frequency bias to regulate network frequency and to provide almost instantaneous emergency service, all support the conclusion that FPL is an integral part of a vast, coordinated interstate network. This evidence, together with the evidence on the electromagnetic unity of response, fully supports the Commission's conclusion that FPL does, in fact, own facilities for the transmission of electric energy in interstate commerce *i.e.*, in the words of Section 201(c) of the Act, energy "transmitted from a State and consumed at any point outside thereof"

This Court's dictum in *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U.S. 61, 72, that "[m]ere connection determines nothing" does not compel a rejection of the Commission's determination here. In the first place, the Commission's finding (27) here rested upon much more than the mere fact of FPL's interconnection with an interstate network. But more fundamentally, the Court in *Jersey Central* did not

[16] Compare *Pantomimic Corp. v. Malone*, 238 Fed. 135 (C.C.A.2), where a corporation sought to get around a statute barring the importation of prize fight films by setting up a camera eight inches on the American side of the Canadian border and exposing a banned film eight inches on the Canadian side of the border. The court found the action violative of the customs statute, notwithstanding the fact that only rays of light actually crossed the border.

have before it the evaluation of extensive evidence of the interdependence of interconnected systems that was the basis for the Commission's decision in this case. Although some evidence on the synchronization of interconnected utilities was before the Commission in that case, see 129 F. 2d 183, 187, n. 1, the Commission's order finding Jersey Central to be a "public utility," was based upon express finding that electric energy flows could be traced from Jersey Central over the lines of an intervening utility to the State of New York. 2 F.P.C. 541, 542-543. In view of the limited number of interconnections involved in that case and the relative ease with which the energy flows could be traced, there was no occasion for the Commission or this Court, in affirming the Commission, to consider other bases for jurisdiction. Since Jersey Central, however, several jurisdictional cases have arisen involving situations where the tracing of power flows is not practicable. The decisions of the Commission and courts of appeals in those cases support the Commission's decision here.

In *Indiana & Michigan Electric Co. v. Federal Power Commission*, 365 F. 2d 180 (C.A. 7), certiorari denied, 385 U.S. 972, the Seventh Circuit was faced with the question whether particular sales at wholesale of I & M, an admitted "public utility," involved electric energy in interstate commerce and thus were (28) subject to Commission regulation.[17] In finding all of I & M's sales at wholesale subject to its jurisdiction, the Commission noted that it was impracticable to trace energy flows from specific generating plants to specific loads, but concluded that interstate energy nevertheless pervaded the company's entire system. 365 F. 2d at 182. In upholding the Commission's conclusion, the court of appeals relied on the fact that I & M was part of a coordinated power pool operating as an

[17] Section 201(b) of the Act grants the Commission jurisdiction over "the sale of electric energy at wholesale in interstate commerce." Thus to reach any particular wholesale sale, the Commission must establish as a fact that the sale involves energy "in interstate commerce."

integrated system in several states. This court noted that the "electric load of every customer of every operating company in the System is supplied with electric energy from the entire *** pool" and also discussed at length the dynamics of interconnected power systems and the tie line and frequency control equipment employed by the systems. 365 F. 2d at 182-183. Similar results, based upon analyses of the mode of operation of interconnected utilities forming a power pool where tracing was impractical, were reached by the Sixth and Eighth Circuits in *Cincinnati Gas & Electric Co. v. Federal Power Commission*, 376 F. 2d 506 (C.A. 6), certiorari denied, 389 U.S. 842, and *Arkansas Power & Light Co. v. Federal Power Commission*, 368 F.2d 376 (C.A. 8).[18] (29) Another wholesale rate case, *Public Service Company of Indiana v. Federal Power Commission*, 375 F. 2d 100 (C.A. 7), certiorari denied, 387 U.S. 931, provides an even closer analogy to this case. In contrast to the pooling arrangements of which I & M, Arkansas and

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[18]The Commission, in *Arkansas Power & Light*, had noted in a passage of considerable relevance here (34 F.P.C. 747, 751, quoted by the court of appeals, 368 F. 2d at 382):

> An interstate electric network is dynamic and ever changing both with respect to load and to generation source. It is an oversimplification, therefore, to talk in terms of a flow of electricity from point to point in an integrated power network of the type involved here. Instead, generation from each source in the system contributes directly or indirectly, and to an ever varying extent, to the energy present, in all parts of the system which are not isolated from out-of-state energy sources. The fact that, as a matter of engineering determination, identification of either the source or destination of particular units of energy within an interstate power system such as respondent's may be difficult and at times impossible does not detract from the interstate nature of the over-all operation. On the contrary, the more complex and comprehensive the nature of the interstate network, the more unlikely it will be that any energy sources will be measurably identifiable. The use of tracing to disprove that a particular sale of a company which is part of an electrically integrated interstate system is in interstate commerce is a wholly unrealistic methodology which is irrelevant to present day power system technology.

Cincinnati were a part, PSCI's relations with its neighbors were far more limited. 34 F.P.C. 1513, 1516-1517. The company was, however, interconnected with six other utilities and, like FPL here, was part of a multi-state, integrated electric power system.[19] In upholding the Commission's as(30)sertion of jurisdiction over PSCI's sales at wholesale, the Seventh Circuit followed the rationale of the *I & M* and *Arkansas* cases and held that the Commission was not required to make specific tracings of power flows. 375 F. 2d-103-104.

The court below sought to distinguish the above case on two grounds: (1) that the utilities there involved were all members of interstate power pools and (2) that establishing wholesale rate jurisdiction over an electric company already subject to Commission jurisdiction is a different matter from establishing jurisdiction over a company in the first instance (App. 369-371). Neither distinction, in our view, is significant.

While undoubtedly FPL's participation in the Florida Operating Committee and the ISG lacks the scope of the pooling arrangements of which I & M, Arkansas, Cincinnati and, to a lesser extent, PSCI were a part, the difference is only one of degree and is not material to the issue whether interstate energy is present in a system or a particular portion of a system.. As we have shown (see pp. 11, 26, *supra*), FPL receives substantial benefits from its participation in the multistate network to which it is electromagnetically locked.

The second attempted distinction is based on the lower court's view that wholesale cases "have little application to the problems of federalism and reservations of power to the states imposed by the instant (31) case, where the issue is one of

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[19] Referring to the "mere connection" language of this Court in *Jersey Central*, the Commission had noted that "[t]o characterize PSCI's relationships with its neighbors, including those in or receiving power from other states, as mere interconnection is simply to ignore the record." 34 F.P.C. 1513, 1517-1518. Much the same observation can be made with respect to FPL in this case.

whether FPL is a public utility at all ***" (App. 371). As our review of the legislative history of the 1935 amendments to the Federal Power Act indicates, however (see pp. 19-21, *supra*), problems of federalism were very much behind the limitation of Commission rate jurisdiction to sales at wholesale of electric energy in interstate commerce, since the assertion of federal jurisdiction necessarily preempts the jurisdiction of any state authority over such sales. See *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 210-216. In *Southern California*, this Court referred to the debates in Congress in 1935 concerning the scope of federal wholesale jurisdiction under the proposed amendments and the ultimate decision, based largely on an interpretation of *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 to–

> *** draw a bright line easily ascertained, between state and federal jurisdiction *** making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States [376 U.S. 215-216].

Congress employed the same "in interstate commerce" standard to govern Commission jurisdiction over electric utilities as it employed to govern jurisdiction over sales at wholesale; there is no indication in the legislative history that this "bright line" was not to be the same in both situations.

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APPENDIX P

Senate Report No. 621, 74th Congress 1st Session and
House Report No. 1318, 74th Congress 1st Session
(1935)

APPENDIX P.

74th CONGRESS) SENATE Calendar No. 651
1st Session) (REPORT
(No. 621

PUBLIC UTILITY ACT OF 1935

May 13 (calendar day, May 14, 1935.—Ordered to be printed

Mr. Wheeler, from the Committee on Interstate Commerce, submitted the following

REPORT
(To accompany S. 2796)

The Committee on Interstate Commerce, to whom was referred the bill (S. 2796) to provide (in Title I) for the control and elimination of public-utility holding companies operating, or marketing securities, in interstate and foreign commerce and through the mails, and to provide (in Title II) for the regulation of the transmission and sale of electric energy in interstate commerce, for the amendment of the Federal Water Power Act, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass. This bill is a substitute for the bill (S. 1725) introduced on February 6, 1935. In its consideration of the original bill, this committee had before it the printed record of the testimony before the House committee, which heard witnesses upon the companion House bill from February 19 to

April 15, of this year. In addition, page proof of the hearings before this committee, held both mornings and afternoons from April 16 to 29, inclusive, were considered. The proponents of the bill used only 4 days of the hearing time and less than 250 pages of the approximately 1,200-page record. Every objection of the opponents of the bill was carefully considered by the committee in the course of a week of executive sessions, spent in discussing word for ward the original bill and all proposed amendments. As the result of hearings, and the proposed amendments, the committee has so extensively amended S. 1725 that the committee has through it advisable to report a substitute bill.

* * *

(17) holding-company officers and bankers, and the purchase of securities at exorbitant prices from corporate insiders. In short, the individual investor should receive the kind of a security he thought he was buying in the first place. The actual clearing up, through clean reorganizations, of the tangle in which holding-company finance has left the industry and those who have invested in it, can reestablish a confident, stable market for good utility securities. But a frightened policy of refusing to take hold of the obvious political and financial difficulties of the industry will only generate even greater future difficulties.

TITLE II.—CONTROL OF OPERATING UTILITY COMPANIES, AMENDMENTS TO FEDERAL WATER POWER ACT

I. GENERAL PURPOSES OF TITLE II

Title II of the bill repeals two sections and amends certain other sections of the present Federal Water Power Act, and the present act, as this modified, is designated part 1. Two new parts are then added. Part 2 contains substantive provisions for the

regulation of electric energy in interstate commerce. Part 3 contains procedural and administrative provisions applicable to the regulation of licensees under part 1 and interstate public utilities under part 2.

The amendments to the present Federal Water Power Act have been requested by the Federal Power Commission on the basis of its experience in the administration of that act. Most of them are designed merely to clarify the act in its application to situations that have arisen in its administration. The detailed section analysis of the title which follows will make clear the effect of each of these amendments.

In recent years the growth of giant holding companies has been paralleled by the rapid development of the electric industry along lines that transcend State boundaries. To a great extent through the agency of the holding company, local operating units have been tied together into vast interstate systems. As a result the proportion of electric energy that crosses State lines has steadily increased. While in 1928, 10.7 percent of the power generated in the United States was transmitted across State lines, the percentage had increased by 1933 to 17.8. The amount of energy which flowed in interstate commerce in 1933 exceeded the entire amount generated in the country in 1913.

The new part 2 of the Federal Water Power Act would constitute the first assertion of Federal jurisdiction over this major interstate public utility. The decision of the Supreme Court in Public Utilities Commission v. Attleboro Steam & E, Co. (273 U. S. 83), placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States. Other features of this interstate utility business are equally immune from State control either legally or practically.

The necessity for Federal leadership in securing planned coordination of the facilities of the industry which alone can produce an abundance of electricity at the lowest possible cost has been clearly revealed in the recent reports of the Federal Power Commission, the Mississippi Valley Committee, and the National Resources Board. Assertion of the power of the

Federal Government in this direction (18) becomes the more important at the time when the Federal Government is compelling the reorganization of holding companies along regional lines. The new part 2 of the Federal Water Power Act seeks to bring about the regional coordination of the operating facilities of the interstate utilities along the same lines within which the financial and managerial control is limited by title 1 of the bill.

Part 2 places the utilities under the regulated conditions which have been prescribed for the principal other national utilities. Commission approval is required before they may issue new securities or consolidate or transfer their operating properties. The Commission is authorized to prescribe the form in which their accounts are to be kept. The sale price of energy sold at wholesale in interstate commerce is made subject to Commission determination.

The Federal Water Power Act, as amended, including the new parts 2 and 3, is given the short title, the "Federal Power Act." This entire act is to be administered by the Federal Power Commission.

2. MATERIAL DIFFERENCES BETWEEN TITLE II OF S. 2795 AND TITLE II OF S. 1725

As has been stated, the committee has liberalized title II of the original bill and endeavored to remove all possible grounds for the charge that is imposes harsh or burdensome restrictions upon the electric industry. The revision has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters. In reviewing the material differences between the original bill and the present

one, it will not be necessary to point out all of the places where this jurisdictional limitation has been written into the bill.

A. *Changes in part 1.*—The amendments to the present Federal Water Power Act embodied in part 1 of title II do not differ in any substantial respect from those originally requested by the Federal Power Commission and included in the original bill.

A change has been made in sections 201 and 202 where reference is made to the "actual, legitimate original cost" of a project. These are the words in the present Water Power Act. In S. 1725, the word "prudent" was inserted after "legitimate." The committee has not accepted this amendment. It thinks that the addition of this word is unnecessary and likely to cause confusion. The Federal Power Commission has interpreted the word "legitimate" to give it authority to reject all claims of cost items that are not fair and reasonable charges against the cost of the project. Obviously such an interpretation is the only one which gives effect to the word "legitimate." The committee sees no reason to change the present law under which the Federal Power Commission has effectively exercised the essential power of disallowing imprudent expenditures. To do so might unjustifiably reflect on the past action of the Commission.

An amendment to section 17 of the Water Power Act imposes upon licensees a penalty for delinquency in payment of annual charges. In (19) the original bill this penalty was to be 10 percent of the amount delinquent for the first month and 5 percent for each subsequent month. These figures have been reduced so as to make the penalty 1 percent per month. A moderate penalty should achieve the purpose of securing prompt payment.

Section 212 has been amended to include a repeal of the general penal section of the Federal Water Power Act (sec. 25). The original bill, in part 3, contained a general penalty section applicable to licensees as well as interstate utilities but it did not repeal the present section. This would have left two penal sections in force covering the same offenses.

B. *Assertion of jurisdiction over interstate utilities.*—Section 201 which sets forth the subject matter covered by part 2 of title II has been materially rewritten. A declaration of the necessity for Federal regulation of the interstate part of the electric business has been added as subsection (a). Subsection (b), formerly (a), which states the subject matter to which the part relates, has been clarified to make plain that it includes interstate transmission where there is no sale and excludes all facilities used only for production of transmission in intrastate commerce or in local distribution. A new subsection (e) has been added to remove all doubt that the act is not to apply to public projects, Federal, State of municipal. Despite repeated assurances by representatives of the Federal Power Commission that no such authority was intended, the charge was frequently made that the bill as originally introduced authorized the Commission to compel private utilities to establish connection or exchange power with public plants. This new subsection carries out in unmistakable terms the original intention of the bill in this respect.

C. *Interconnection and coordination of facilities; the common carrier.*—Section 202 (a) of S. 1725 imposed upon each public utility the duty to furnish energy to, exchange energy with and transmit energy for any person upon reasonable request. This provision has been eliminated, and the other subsections of the old section 202 which relate to rates have been removed to the general rate section (sec. 205). While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202 (a), formerly (formerly sec. 203 (a)), for the first Federal effort in this direction. The authority to compel utilities to establish physical connection with the facilities of other companies and to sell and exchange energy, now contained in section 202 (b), has been limited to cases instituted

by complaint of a State commission or a public utility and to cases in which both parties to the order are interstate utilities. Furthermore, the provisions of the old section 203 (b) empowering the Federal Power Commission to require one utility to permit the use of its facilities by another, or to make extensions or improvements have been eliminated; these matters are left to the voluntary action of the utilities. The emergency powers given the Federal Power Commission which were indefinite in the original bill have been spelled out with particularity in section 202 (c) and appropriately limited to periods of war or other emergency. At such times the Commission may require such temporary connections, and such generation, delivery, (20) interchange or transmission of energy as it considers necessary to meet an emergency shortage.

D. *Certificate of convenience and necessity.*—The requirement in section 204 of S. 1725 that a public utility secure a certificate of convenience and necessity before constructing, acquiring, or abandoning facilities has been eliminated entirely. While it may ultimately be found desirable to adopt a provision of this kind, the committee is of the opinion that for the present there is no imminent danger of excessive extensions that would prove disadvantageous to consumers.

E. *Disposition of facilities.*—Section 203, which was section 205 of the original bill, requires Commission approval of the sale, lease, or other disposition of facilities subject to the act and of the consolidation of such facilities. The section has been changed by eliminating the words "assign", "mortgage", and "encumber" from the sections made subject to approval. As proposed bond issues require approval under the security section, the elimination of these words removes an unnecessary duplication. The section has also been liberalized by limiting its application to facilities of a value exceeding $25,000 and by making it inapplicable to the disposition of property retired from service in the ordinary course of business.

F. *Security issues.*—The security section, now section 204, has been rewritten to attain greater flexibility and workability

than would have been possible under the original section. The language defining the purposes for which securities may be issued has been taken substantially from section 20a of the Interstate Commerce Act, which has proved its usefulness. There has also been added to this section an express provision that preserves the jurisdiction of the State commissions over security issues.

G. *Rates.*—Section 205 (b), transferred from section 202 (e) of the original bill, has been modified by prohibiting merely undue, instead of all, preferences or prejudices in rates. The provisions defining with particularity the power of the Commission to investigate single rates and to fix standards of service (former secs. 208 (b) and 210) and the section authorizing the issuance of reparation orders (former sec. 213) have been eliminated. They are appropriate sections for a State utility law, but the committee does not consider them applicable to one governing merely wholesale transactions. The provision requiring the fixing of rates upon the basis of the actual cost of the property devoted to the service in question (now sec. 208 (c)) has been modified so as to make clear that the rate base is to be no higher than the actual legitimate cost of the property. Furthermore, it is expressly provided that the accrued depreciation of property is to be deducted from the rate base, and the section (302 of S. 1725) requiring the sinking-fund method of depreciation accounting has been eliminated. This practice is contrary to that of most of the States in the country and the committee is of the opinion that its introductic in a Federal statute would cause unnecessary confusion and hardship.

H. *Holding company relations.*—Sections 215 and 216 of the original bill related to service contracts with utilities and the acquisition of utility securities by holding companies. These subjects are fully covered by title 1, and the revised bill removes the duplication.

I. *Accounting.*—In section 301, requiring utilities to keep the accounts prescribed by the Federal Power Commission, a

proviso has been added to make sure that nothing in the act shall relieve any public utility from keeping accounts required by State law.

* * *

74TH CONGRESS) HOUSE OF (REPORT
1st Session) REPRESENTATIVES (No. 1318

PUBLIC UTILITY ACT OF 1935

JUNE 24, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

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Mr. Rayburn, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany S. 2796]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 2796) to provide for the control and elimination of public-utility holding companies operating, or marketing securities, in interstate and foreign commerce and through the mails, to regulate the transmission and sale of electric energy in interstate commerce, to amend the Federal Water Power Act, and for other purposes, having considered the same, report thereon with amendments, and as so amended recommend that the bill do pass.

The first committee amendment strikes out all of the Senate bill and inserts in lieu thereof a substitute which appears in the reported bill in italic type.

The second committee amendment amends the title of the bill to make it conform to the changes made by the committee amendment.

TITLE I. REGULATION OF PUBLIC UTILITY HOLDING COMPANIES

1.THE PRESIDENT'S MESSAGE

On March 12, the President sent the following message to Congress, transmitting a report on public-utility holding companies by the National Power Policy Committee:

To the Congress of the United States:

I am transmitting to you herewith a report submitted to me by the National Power Policy Committee. I named this committee last summer from among the departments of the Government concerned with power problems to make a series of reports to coordinate Government policy on such problems. This report I am submitting to you is the recommendation of the committee with respect to the treatment of holding companies in the public-utility field. It deserves the careful attention of every Member of the Congress.

The so-called "Public Utility Holding Co. bill" (title I of House Bill 3423 and of Senate bill 1725), which was drafted under the direction of congressional leaders incorporates many of the recommendations of this report. * * *

(2)So much has been said through chain letters and circulars and by word of mouth that misrepresents the intent and purpose of a new law that it is important that the people of the country understand once and for all the actual facts of the case. Such a measure will not destroy legitimate business or wholesome and productive investment. It will not destroy a penny of actual value of those operating properties which holding companies now control and which holding-company securities represent insofar as they have any value. On the contrary, it will surround the necessary reorganization of the holding company with safeguards which will in fact protect the investor.

We seek to establish the sound principle that the utility holding company, so long as it is permitted to continue, should

not profit from dealings with subsidiaries and affiliates where there is no semblance of actual bargaining to get the best value and the best price. If a management company is equipped to offer a genuinely economic management service to the smaller operating utility companies it ought not to own stock in the companies it manages, and its fees ought to be reasonable. The holding company should not be permitted to establish a sphere of influence from which independent engineering, construction, and other private enterprise is excluded by a none too benevolent private paternalism. If a management company is controlled by related operating companies, it should be organized on a truly mutual and cooperative basis and should be required to perform its services at actual cost demonstrably lower than the services can be obtained in a free and open market.

We do not seek to prevent the legitimate diversification of investment on operating utility companies by legitimate investment companies. But the holding company in the past has confused the function of control and management with that of investment and in consequence has more frequently than not failed in both functions. Possibly some holding companies may be able to divest themselves of the control of their present subsidiaries and become investment trusts. But an investment company ceases to be an investment company when it embarks into business and management. Investment requires the judicial appraisal of other people's management.

The disappearance at the end of 5 years of those utility holding companies which cannot justify themselves as necessary for the functioning of the operating utility companies of the country is an objective which congressional leaders I have consulted deem essential to a realistic and farsighted treatment of the evils of public-utility companies. For practical reasons we should offer a chance of survival of those holding companies which can prove to the Securities and Exchange Commission that their existence is necessary for the achievement of the public ends which private utility companies are supposed to

serve. For such companies, and during the interim period for other companies, the proposal for a comprehensive plan of public regulation and control is sound.

But where the utility holding company does not perform a demonstrably useful and necessary function in the operating industry and is used simply as a means of financial control, it is idle to talk of the continuation of holding companies on the assumption that regulation can protect the public against them. Regulation has small chance of ultimate success against the kind of concentrated wealth and economic power which holding companies have shown the ability to acquire in the utility field. No Government effort can be expected to carry out effective, continuous, and intricate regulation of the kind of private empires within the Nation which the holding-company device has proved capable of creating.

Except where it is absolutely necessary to the continued functioning of a geographically integrated operating utility system, the utility holding company with its present powers must go. If we could remake our financial history in the light of experience, certainly we would have none of this holding company business. It is only a comparatively late innovation. It dates definitely from the same unfortunate period which marked the beginnings of a host of other laxities in our corporate law which have brought us to our present disgraceful condition of competitive character-mongering between our States. And it offers too well demonstrated temptation to, and facility for, abuse to be tolerated as a recognized business institution. That temptation and that facility are inherent in its very nature. It is a corporate invention which can give a few corporate insiders unwarranted and intolerable powers over other people's money. In its destruction of local control and its substitution of absentee management, it has built up in the public-utility field what has just been called a system of private socialism which is inimical to the welfare of a free people.

Most of us agree that we should take the control and the benefits of the essentially local operating utility industry out of

a few financial centers and give back that control and those benefits to the localities which produce the business and (3) create the wealth. We can properly favor economically independent business, which stands on its own feet and diffuses power and responsibility among the many, and frowns upon those holding companies which, through interlocking directorates and other devices, have given tyrannical power and exclusive opportunity to a favored few. It is time to make an effort to reverse that process of the concentration of power which has made most American citizens, once traditionally independent owners of their own businesses, helplessly dependent for their daily bread upon the favor of a very few, who, by devices such as holding companies, have taken for themselves unwarranted economic power. I am against private socialism of concentrated private power as thoroughly as I am against governmental socialism. The one is equally as dangerous as the other; and destruction of private socialism is utterly essential to avoid governmental socialism.

On April 28, in a radio address to the people of the country, the President supplemented his earlier message on public-utility holding companies as follows:

There is likewise pending before the Congress legislation to provide for the elimination of unnecessary holding companies in the public-utility field.

I consider this legislation a positive recovery measure. Power production in this country is virtually back to the 1929 peak. The operating companies in the gas and electric utility field are by and large in good condition. But under holding-company domination the utility industry has long been hopelessly at war within itself and with public sentiment. By far the greater part of the general management of unnecessary holding-company control has lost touch with and has lost the sympathy of the communities it pretends to serve. Even more significantly, it has given the country as a whole an uneasy

apprehension of overconcentrated economic power in the hands of a very few.

A business that loses the confidence of its customers and the good will of the public cannot long continue to be a good risk for the investor. This legislation will serve the investor by ending the conditions which have caused that lack of confidence and good will. It will put the public-utility operating industry on a sound basis for the future, both in its public relations and in its internal relations.

This legislation will not only in the long run result in providing lower electric and gas rates to the consumer but it will protect the actual value and earning power of properties now owned by thousands of investors who have little protection under the old laws against what used to be called "frenzied finance" and remember that it will not destroy legitimate values.

2.THE GENERAL PURPOSES OF TITLE I

This title seeks to subject to effective public control public-utility holding companies which transcend State lines in their interests and activities. The title seeks to correct the grave abuses disclosed by the reports of the Federal Trade Commission and the reports made for this committee by its special counsel, Dr. Walter M. W. Splawn, now a member of the Interstate Commerce Commission.

Inasmuch as most of the privately owned gas and electric operating companies in the country are controlled by holding companies, the problems involved are many and intricate and of greatest importance, both to the investing and consuming public. The committee gave careful consideration to title I of the Senate bill (S. 1725) which was referred to it, and concluded to report a substitute bill.

The committee substitute contains provisions regulating, under the jurisdiction of the Securities and Exchange Commission, the principal activities of public-utility holding companies and, to the extend deemed necessary, the activities of

their subsidiary companies. These regulatory provisions fall into six fairly well-defined classes as follows:

(1) Issue and sale of securities (secs. 6 and 7);
(2) Acquisition of securities, utility assets, and interests in other businesses (secs. 8, 9, and 10);
(4) (3) Simplification of holding-company systems (sec. 11);
(4) Intercompany transactions (sec. 12);
(5) Service, sales, and construction contracts (sec. 13); and
(6) Reports and accounts (secs. 14 and 15).

The remaining sections of the committee substitute are devoted to such matters as liability for misleading statements (sec. 16), reports of the security transactions of officers and directors (sec. 17), and contain the appropriate provisions for the administration of the title by the Securities and Exchange Commission and its enforcement in the courts.

3. PRINCIPAL DIFFERENCES BETWEEN TITLE I OF THE COMMITTEE SUBSTITUTE AND TITLE I OF THE SENATE BILL (S. 2796)

Title I of the bill as passed by the Senate and title I of the substitute herewith reported are similar in many respects. The section numbers correspond throughout except for the last few sections, and the same subjects of regulation are dealt with. It is not practicable to attempt to set forth all of the differences between the titles of the two bills, but the following statement will indicate the principal differences.

Section 1 (b) has been rewritten so that instead of being in the form of a statement of facts as to abuses which have occurred in connection with the public-utility holding company, it is a statement, based on facts revealed by investigations and hearings, of abuses and conditions the existence or occurrence of which adversely affect the public interest and the interest of investors and consumers. This subsection, by virtue of subsection (c), will furnish a standard for the Commission's

determination of what is in the public interest and the interest of investors or consumers.

Section 2, paragraph 7, in the definition of "holding company" there is omitted the Senate provision under which a company would be a holding company when its ownership of the requisite amount of voting securities of a public-utility company was "in conjunction and pursuant to an arrangement or understanding with one or more other persons."

The definitions of "electric utility company" and "gas utility company" are modified by including therein provisions by which a particular company primarily engaged in one or more other businesses and selling only a small amount of electric energy or gas is to be exempted by the Commission. The House definition of a gas utility company is confined to companies engaged in the retail distribution of gas.

The definition of "affiliate" is restricted so as not to cover so large a number of companies and persons as in the Senate bid.

Throughout the bill where reference is made to a "geographically and economically integrated public-utility system", a phrase which is not defined in the Senate bill, the phrase is changed to "integrated public-utility system" and a definition of it is included.

The defined term "capital assets" is changed to "utility assets".

Section 3 (a) which authorizes the Commission to exempt holding companies and their subsidiaries from the provisions of the title, differs from the provision in the Senate bill. The Senate provision provides that in the case of the exemption of holding companies and (5) their subsidiary companies the exemption shall be from any provision or provisions except insofar as the Commission finds the exemptions from any provision affecting the sale or distribution of securities by any means or instrumentality of interstate commerce detrimental to the protection of investors. The duty of the Commission under the House provision is to make such exemption unless and except insofar as the Commission finds the exemption

detrimental to the public interest or the interests of investors or consumers. Under paragraph (3) of subsection (a), which defines a class of holding companies which may be exempted, the House amendment includes companies not included in the Senate bill, namely, any company which is only incidentally a holding company, being primarily engaged in one or more businesses other than the business of a public-utility company and deriving a material part of its income from one or more subsidiary companies, if substantially all the outstanding securities of such companies are owned directly or indirectly by such holding company.

In section 4 the date prior to which certain holding companies are required to register if they are to carry on their interstate activities is changed from October 1 to November 1, 1935; and there is omitted paragraph (6), under which it would be unlawful for an unregistered holding company to own, hold, or control any security of any subsidiary company thereof that does any of the acts enumerated in the five preceding paragraphs. Corresponding changes are made in the dates in subsection (b).

Section 5 is changed in striking out certain paragraphs in subsection (b), providing for the filing of information after registration.

Sections 6 and 7 relating to Commission approval of the issuance of securities and the changing of priorities, preferences, voting power, and other rights of holders of outstanding securities are modified so that the only subsidiary companies subject thereto are public utilities the issuance of whose securities is not subject to regulation by a State commission.

Section 6 is modified by striking out subsection (c) relating to house-to-house sales of securities and substituting a provision making it unlawful for any registered holding company to cause employees of a subsidiary company to sell the securities of the holding company.

Section 7 is amended by striking out subsection (f), relating to the prescribing of terms and conditions by the Commission in

connection with permitting a declaration regarding the issuance of securities to become effective; subsection (g), relating to the requirement that a declaration should not become effective unless applicable State laws shall have been complied with; and subsection (h), a provision intended to bring about prompt registration by companies expecting to issue securities.

Sections 8, 9, and 10 are modified so that the requirement that a registered holding company of subsidiary company should not acquire any interest in any business other than (1) a public-utility company as such, or (2) a business in which the acquiring company is already engaged or has an interest, or which is reasonably incidental or necessary or appropriate to the conduct of such business, is omitted. There is also omitted the provision which prohibited acquisitions bringing into holding-company systems natural-gas properties or pipe lines. These sections are also modified so as to require Commission (6) approval not only of securities and utility assets as under the Senate bill, but also of the acquisition of any other interest in any business. The provision that no acquisition of securities or utility assets is to be approved unless State laws are complies with is extended to cover the acquisition of any other interest, but the whole provision is conditioned by providing that the provision shall not apply where it would be detrimental to carrying out the provisions of section 11.

Section 11, relating to the simplification of holding-company systems and the elimination of holding companies, is modified so that the only remaining provision providing for simplification or elimination makes it the duty of the Commission to require each holding-company system to confine its operations to one integrated public-utility system, with the exception that if the Commission finds that such a limitation is not necessary in the public interest, it is to require the limitation of the operations of the holding-company system to such number of integrated public-utility systems as it finds may be included in the holding-company system consistently with the public interest. The Commission is authorized to require divestment of

nonutility property only where it finds the retention thereof would be inconsistent with the public interest, and the Commission is further limited in that it may not require divestment of interests outside of the United States. The Commission may proceed either upon its own motion or upon application of the companies involved, but may proceed upon its own motion only after January 1, 1938. The provisions relating to special judicial procedures in connection with divestment are eliminated from section 11, and the orders of the Commission are to be enforced in the same manner as its other orders issued under the title.

Section 12 is amended by striking out subsection (g), relating to a prohibition upon affiliates of public-utility companies or registered holding companies or subsidiary companies thereof entering into transactions with the companies of which they are affiliates, in contravention of the regulations of the Commission.

Section 13, relating to service, sales, and construction contracts is modified in several material respects. The provisions for setting up mutual service companies are eliminated, the absolute restriction on subsidiary companies entering into or performing service, sales, or construction contracts with public-utility companies in the same holding-company system is eliminated, and a new provision is included which makes it unlawful for any subsidiary of the registered holding company to enter into or perform any service, sales, or construction contracts with other companies in the same holding-company system in contravention of the rules, regulations, or orders of the Commission. The provision relating to the performance of these contracts by affiliates has been eliminated.

Section 15 is amended by striking out subsection (e), giving authority to the Commission to prescribe uniform methods of accounts for persons subject to subsection (a) and (b) of this section, and subsection (j) is omitted for the reason that it was considered to be unnecessary.

Section 17 (a) and (b), referring to reports by officers, directors, and affiliates, and giving a remedy in the case of

unfair use of information by officers, directors, or affiliates are changed by striking out the reference to affiliates and by providing that the section shall not give a remedy where one is given under section 16 (b) of the Securities Exchange Act of 1934.

(7) Section 21 is changed by omitting the sentence providing that "Nothing in this title shall exempt any public-utility company from obedience to the law of any State in which it operates", on the theory that it imposed a limitation which might interfere with the carrying out of the provisions of section 11 or other sections, under which it might be necessary to do things not permitted under State law.

Section 25 is changed so as to give State courts concurrent jurisdiction with the Federal courts of suits in equity and actions at law brought to enforce any liability or duty created by, or enjoin any violation of the title or the rules, regulations, or orders thereunder.

The penalty provision (sec. 29) is modified so that the fine of not more than $200,000 which may be imposed in case of failure of a holding company to register as required, will only apply were the holding company is not an individual. The maximum fine applicable to an individual is $10,000.

Section 30, providing for an investigation of public-utility companies in order to determine the size and type most appropriate to serve the public interest and providing for a study of investment trusts and companies, is omitted as surplusage.

Under the Senate bill the Federal Power Commission was vested with certain functions under title I. Under the committee substitute all such functions are vested in the Securities and Exchange Commission.

TITLE II. AMENDMENTS TO FEDERAL WATER POWER ACT; REGULATION OF INTERSTATE ELECTRIC UTILITY COMPANIES

GENERAL PURPOSES OF TITLE II

Title II of the bill makes certain amendments to the present Federal Water Power Act and establishes for the first time regulation of electric utility companies transmitting energy in interstate commerce. The amendments to the Water Power Act appear at the beginning of the title. The present Water Power Act is made part I of the amended Federal Power Act. Two new parts are then added: Part II consisting of the substantive provisions for the regulation of interstate operating companies; and Part III containing the general provisions applicable to both licenses under part I, and interstate utilities under part II.

The amendments to the present Federal Water Power Act are all minor. They have been requested by the Federal Power Commission, largely for the purpose of clarifying the act in its application to situations that have arisen in its administration, and also to strengthen it in certain particulars. The effect of these amendments is shown in the detailed section analysis which follows.

The new parts are designed to meet the situation which has been created by the recent rapid growth of electric utilities along interstate lines. The percentage of electric energy generated in the United States that was transmitted across State lines increased from 10.7 in 1928 to 17.8 in 1933. The amount of energy transmitted in interstate commerce in 1933 was greater than all of the energy generated in the country in 1913. Under the decision of the Supreme Court of the United Stated in Public Utilities Commission v. Attleboro Steam & E. Co. (273 U. S. 83), the rates charged in interstate wholesale (8) transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates. A "wholesale" transaction is defined to mean the sale of electric

energy for resale and he Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce.

Part II gives control over security issues of interstate operating companies in cases where no State commission has control and over the consolidation, purchase, and sale of interstate operating properties. The bill also provides for the establishment of regional districts for the interconnection and coordination of electric facilities by the voluntary action of the utilities within and between the districts. Whenever such voluntary measures are found to be ineffective, the Commission is given limited authority, upon complaint of a State commission or an operating utility, to require physical connection and the sale of interchange of energy. The bill also authorizes the Commission to ascertain the cost of property used in rendering service; to prescribe a uniform system of accounts; to determine proper depreciation rates and to make investigations and reports to Congress relating to the electrical industry.

The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. Provision is made for joint boards composed of members of State commissions which may be used for this purpose. The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.

SECTIONAL ANALYSIS OF BILL

TITLE I

SECTION 1. BASIS OF JURISDICTION AND NECESSITY FOR REGULATION OF PUBLIC-UTILITY HOLDING COMPANIES

Subsection (a) sets forth the facts by reason of which public-utility holding companies are affected with a national public interest.

Subsection (b) contains an enumeration of the conditions which justify Federal regulation of public-utility holding companies in the national public interest.

Subsection (c) declares the legislative policy embodied in title I to be that of meeting the problems and eliminating the abuses connected with public-utility holding company systems.

SECTION 2. DEFINITIONS

Subsection (a) contains definitions of 27 terms that are used throughout the title, such as security, holding company, subsidiary company, associate company, affiliate, integrated public-utility system, service contract, sales contract, construction contract, utility assets, and others. Most of the definitions are self-explanatory and mention is here made only of the more important of these definitions.

(9) "Commission" (6) is defined as the Securities and Exchange Commission, and the administration of the title is vested in that Commission.

"Electric utility company" (3) is defined to include both wholesale and retail sellers of electric energy, and transmission companies, with appropriate exemptions by order of the Commission, upon application, for companies which are primarily engaged in businesses other than the business of an electric utility company.

"Gas utility company" (4) includes only those companies which distribute natural or manufactured gas at retail or own facilities for such retail distribution, with appropriate exemptions by order of the Commission, upon application, for companies that are primarily engaged in businesses other than the business of a gas utility company.

"Holding company" (7) is defined in two parts: (A) In terms of owning or controlling, directly or indirectly, 10 percent or more of the voting securities of a utility (gas or electric) company or another holding company, or of holding such securities with power to vote; and (B) in terms of "exercising a controlling influence" over the management or policies of a utility company. Under the flexible definition in (B), no company is to be deemed a holding company or have any duty as such until the Commission so finds after notice and opportunity for hearing. The flexibility here provided is necessary in order that title I can meet the varied and subtle forms which corporate interrelationships have in the past and will in the future take. A company which is automatically a holding company under (A) by reason of stock ownership, control, or holdings, can nevertheless file an application for determination that it is not a holding company in terms of controlling a public-utility company. Pending the Commissions' action on such an application, the provisions of the title are suspended as to the applicant. The denial of an application does not, of course, preclude a company from making another application after a change of circumstances.

"Subsidiary company" (8) is also defined, conversely from "holding company", in terms of stock ownership or control, or in terms of holding stock with power to vote, and subsection to a controlling influence; the same administrative machinery for Commission determination and exemption is provided.

"Holding company system" (9) is used to designate a holding company and all its subsidiary companies.

"Associate company" (10) of a company is used to designate any other company in the same holding company system with such company.

"Affiliate" (11) is a term which includes some of the common relationships which make for an absence of arms'-length bargaining. The definition, like that of "holding company", embraces two parts: The first two clauses are of automatic application. The first defines as affiliates companies with a certain relation by stock ownership or control, or by holding stock with power to vote. The second makes the officers and directors of a company affiliates of that company. The third clause is the flexible provision which operates only after the Commission determines that the person or company involved stands in such relation to another company that there is such an absence of arm's-length bargaining in the transactions between them as to make it necessary or appropriate in the public interest that such (10) person or company be subject to the obligations, duties, and liabilities imposed in title I upon affiliates. Again in the flexible clause ample protection is given by providing in subsection (b) of this section that no person shall be deemed an affiliate under the flexible clause until after the Commission has made its determination and notified the party affected.

"Utility assets" (16) is defined to include only the facilities, in place, of an electric or gas utility company.

"Voting security" (17) is defined, in part, to mean a security presently entitling the owner or holder to certain voting rights. Some securities are issued with the privilege of voting only under specific circumstances and the purpose of using the word "presently" is to refer to securities as of the time when the security carries the privilege of voting.

"Integrated public-utility system" (27) is defined to mean—(A) as applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and distributing facilities, whose utility assets, whether owned by one or more electric utility companies,

are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management and efficient operation: and (B) as applied to gas utility companies, a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management and efficient operation, provided that gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region.

Subsection (b) gives the necessary protection to the persons and companies which will become holding companies, subsidiary companies, or affiliates under the flexible provisions of those definitions by providing that they shall not be deemed to be such until 30 days after the Commission's determination on a hearing.

Subsection (c) states that no provision of the title shall apply to the United States or any State or political subdivision thereof or to any agency of any of the foregoing unless specific reference is made thereto.

SECTION 3. PARTICULAR EXEMPTIONS REGARDING HOLDING COMPANIES, SUBSIDIARY COMPANIES, AND AFFILIATES

Subsection (a) describes five classes of companies which, although technically holding companies under the definitions, are essentially not the kind of public-utility holding companies at which the purposes of the legislation are directed, for one of

the following reasons: (1) The whole system is intrastate; (2) the company is itself a utility, being a holding company only in form by reason of the fact that it has one or more minor subsidiary utilities; (3) the company is not (11) essentially in the utility field and either (A) gets no appreciable income from utilities, or (B) if it gets an appreciable income from utilities, it owns all the outstanding securities of those utilities so that they are not financed by the public but are essentially departments, rather than subsidiaries, of the parent company; (4) the company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation of a bona fide debt, or in connection with a bona fide arrangement to underwrite the securities; or (5) the company has no subsidiary utilities in the United States and is not itself a domestic utility.

It is the duty of the Commission, as to any company which it finds to fall in one of these five categories, to exempt such company from any provision or provisions of title I to the extent it deems such exemption not detrimental to the public interest or the interest of investors or consumers. By thus imposing a mandatory duty upon the Commission to exempt companies falling within defined categories except where such exemption is definitely detrimental to the basic purposes of the statute, the committee has felt free to broaden the exemptions beyond what would be justified if the exemptions had been made unqualified and self-operative and beyond the power of the Commission to correct when abused or used to circumvent the purposes of the title. On the other hand, companies entitled to exemption from this subsection as holding companies or as subsidiaries of exempted holding companies may still be subject to the provisions of title I as subsidiaries of other holding companies which are not exempted, unless they are exempted by reason of subsection (b) or some other provision of the title.

Subsection (b) authorizes the Commission to exempt specified classes of affiliates or subsidiary companies from one or more provisions of the title if and to the extent the Commission deems such exemption necessary or appropriate in

the public interest or for the protection of investors or consumers.

SECTION 4. TRANSACTIONS BY UNREGISTERED HOLDING COMPANIES

This section establishes the mechanism by which holding companies are brought under the jurisdiction of the Commission so that the provisions of title I may be effectively administered. That mechanism is registration, and it is made the duty of every holding company, unless exempted, to register by November 1, 1935, if it is to carry on any of the activities which are national in scope and hence of particular concern to the Federal Government. Unregistered companies after that date are prohibited from engaging in these activities unless they are registered.

Subsection (a) enumerates the acts involved as follows:

(1) To sell, transport, or transmit gas or electric energy in interstate commerce or to own or operate any capital assets for so doing.

(2) To use the mails or any means or instrumentalities of interstate commerce for the performance of any service, sales or construction contract for a public-utility or holding company.

(3) To use the mails or means or instrumentalities of interstate commerce to distribute or make a public offering of any security of the company, any of its subsidiary companies or affiliates, or any public-utility or holding company, or to sell any such security to any

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APPENDIX Q

Glossary of Terms

ATTACHMENT A

GLOSSARY[1]

BULK ELECTRIC SYSTEM

A term commonly applied to the portion of an electric utility system that encompasses the electricl generation resources and bulk transmission facilities.

COMPETITIVE ACCESS

Access by suppliers of electricity to transmission grids, leading to competition with owners of such grids and other suppliers.

GENERATION (Electricity)

The process of producing electrical energy from other forms of energy; also, the amount of electric energy produced, usually expressed in kilowatthours (kWh) or megawatthours (MWh).

Generation, **Gross**

The electrical output at the terminals of the generator, usually expressed in megawatts (MW).

Generation, **Net**

Gross generation minus station service or unit service power requirements, usually expressed in megawatts (MW).

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[1] Selected and adapted from the Glossary of Terms prepared by the Glossary of Terms Task Force of the North American Electric Reliability Council.

LOCAL DISTRIBUTION FACILITIES

The facilities that bring electricity from the transmission system to end users.

MUNICIPALIZATION

The process by which a new municipal utility is formed to serve former retail customers of a utility. The new municipality will purchase electricity at wholesale for the benefit of its residents.

REGULATION

The setting of rates, terms and conditions for a particular service, the establishment of standards for the safety and reliability of the service and the handling of customer complaints.

RETAIL CONSUMER

A customer taking electric service for its own use; an end user.

RETAIL STRANDED COSTS

Costs that a utility incurred to serve end-users and that cannot be recovered because the customers are lost as a result of competitive access to other utility systems. The term "stranded costs," in a general sense, refers to the difference between the net embedded costs of utility plant and the plant's market value. It can also encompass factors such as transaction costs associated with reducing a company's work force, carrying charges on excess capacity or revenue losses due to customer migration to competitive alternatives. These

stranded costs will be associated, for the most part, with generation plant, since the competition will be for generation.

REVENUE REQUIREMENT

The capital costs and expenses that a company normally recovers through regulated rates.

RETAIL TRANSMISSION SERVICE

Transmission provided to a retail customer.

TRANSMISSION

An interconnected group of lines and associated equipment for the movement or transfer of electric energy between points of supply and points at which it is transformed for delivery to distribution systems or is delivered to other electric systems.

UNBUNDLING

The separation of the businesses of transporting electricity and selling the energy previously combined in a "bundled" rate into two rates, one for transport and one for energy.

WHOLESALE DISTRIBUTION SERVICE

Use of the local distribution service to deliver electricity to a wholesale customer (who intends to resell to an end user).

WHOLESALE SALE

A sale of electric energy to an entity that intends to sell it for resale.

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WHOLESALE TRANSMISSION SERVICE

Transmission provided to a wholesale customer (who intends to use the transmission to resell electricity to an end-user).

APPENDIX R

List of Parties

LIST OF PARTIES

Pursuant to Rule 14 of the Supreme Court of the United States, the petitioners and intervenors before the Court below are as follows:

Action Alliance of Senior Citizens of Greater Pennsylvania

Alabama Power Company, et al.
(The Southern Companies)

American Public Power Association

American Forest & Paper Association

American Iron And Steel Institute

Arkansas Public Service Commission

Atlantic City Electric Company

Board of Water, Light And Sinking Fund
Comm'ns of City of Dalton, Georgia

Boston Edison Company, et al.

Cajun Electric Power Coop. Inc. (Trustee)

Carolina Power & Light Company

Central Montana Electric Power Cooperative, Inc.

Central Vermont Public Service Corporation

Chemical Manufacturers Association

Cincinnati Gas & Electric Co.

Citizens For a Sound Economy

Citizens Power, Inc.

Citizens Action Coalition of Indiana, Inc.

Cities of Benton, et al.

The City and County of San Francisco

City of Alma, Michigan

City of Cleveland, Ohio

City of Lakeland, Florida

City of Tallahassee, Florida

Coalition For Economic Competition

Commonwealth Edison Company

Consolidated Edison Company of New York, Inc.

Consumer Energy Company

Council of Industrial Boiler Owners

CSW Operating Companies
(Central Power & Light Company, West Texas Utilities Company, Public Service Company of Oklahoma and Southwestern Electric Power Company)

Dairyland Power Cooperative

The Dayton Power and Light Co.

The Detroit Edison Company

Duke Energy Trading And Marketing
(Formerly PANENERGY Trading and Market Services)

Edison Electric Institute

Electric Clearinghouse, Inc.

Electricity Consumers Resource Council

Electric Power Supply Association

El Paso Electric Company

ENRON Power Marketing

ENTERGY Services Inc.

Federal Energy Regulatory Commission

First Energy Corp.
(Formerly Ohio Edison Company, The Cleveland Electric Illuminating Co., and The Toledo Edison Co.)

Florida Municipal Power Agency

Florida Power Corporation

Florida Power & Light Company

Florida Public Service Commission

Gainesville Regional Utilities

Georgia Transmission Corporation

GPU Energy Companies
(Formerly, General Public Utilities Service, Inc.)

H.Q. Energy Services (U.S.)

Hydro-Quebec

Idaho Public Utilities Commission

Illinois Commerce Commission

Illinois Power Company

Indiana Industrial Energy Consumers, Inc.

Indiana Office of Utility Consumer Counselor

Indianapolis Power & Light Co.

Jacksonville Electric Authority

Kansas City Power & Light Company

Kissimmee Utility Authority

Long Island Lighting Co.

Louisiana Energy And Power Authority

Massachusetts Municipal Wholesale Electric Company

Michigan South Central Power Agency

Multiple Intervenors

Municipal Electric Utilities of Wisconsin

National Association of State Utility Consumer Advocates

National Rural Electric Cooperative Association

National Association of Regulatory Utility Commissioners

Nebraska Public Power District

New England Electric Service

New England Power Company

New Jersey Board of Public Utilities

New York State Electric & Gas Corporation

Niagara Mohawk Power Corp.

North Carolina Utilities

Commission And The Public Staff of The North Carolina Utilities Comm'n

Northeast Texas Electric Cooperative of Texas, Inc.

Northeast Utilities Service Company And Northeast Utilities

Ohio Consumers' Counsel

Ontario Hydro

PANENERGY Trading and Market Services

Pennsylvania Consumer Action Network

Pennsylvania Municipal Electric Association

Pennsylvania Rural Electric Association, et al.

People of The State of New York, et al. and Public Service Commission of The State of New York

PSI Energy, Inc.

Public Citizen, Inc.

Public Power Association of New Jersey

Public Service Company of New Mexico

Public Service Electric & Gas Company

Public Utilities Commission of The State of Colorado

Puget Sound Energy, Inc.

Rochester Gas & Electric Corporation

Safe Energy Communication Council

Sam Rayburn G&T Electric

San Diego Gas & Electric Co.

SASKPOWER

Southern California Edison Co.

South Carolina Electric & Gas Company

Southern California Gas Company

Suffolk County Electrical Agency

Tex-La Electric Cooperative of Texas, Inc.

Transmission Access Policy Study Group

Transmission Dependent Utility Systems

United Homeowners Association

U.S. Public Interest Research Group

Vermont Department of Public Service

Virginia Electric & Power Co.

Virginia State Corporation Commission

Washington Utilities and Transportation Commission

Wisconsin Power & Light Co.

Wisconsin Public Service Corp.

Wolverine Power Supply Cooperative, Inc.

Wyoming Public Service Commission